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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] 61

INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, ET AL., PETITIONERS,

vs.

CENTRAL AIRLINES, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 10, 1962
CERTIORARI GRANTED FEBRUARY 26, 1962

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 656

INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, ET AL., PETITIONERS,

vs.

CENTRAL AIRLINES, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS FORT WORTH, TEXAS

INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, R. K. DOUD, S. V. CORNSTUBBLE, O. L. BROOM, C. R. CASEY, P. R. DAVIS and E. E. FUQUA, Plaintiffs,

versus

CENTRAL AIRLINES, INC., Defendant.

No. 4220-Civil.

ORIGINAL COMPLAINT—Filed November 30, 1959

To the Honorable Judge of the United States District Court:

Now come International Association of Machinists, AFL-CIO, R. K. Doud, S. V. Cornstubble, O. L. Broom, C. R. Casey, P. R. Davis and E. E. Fuqua, plaintiffs, complaining of Central Airlines, Inc., and for cause of action respectfully show the following:

[fol. 2]

1.

Plaintiff International Association of Machinists, AFL-CIO, a voluntary association, is a labor organization; it maintains its principal office at Washington, D. C. and also maintains an office at 3409 Cedar Springs Road, Dallas, Texas. Said plaintiff is a "representative" within the definition of the Railway Labor Act [45 U. S. Code § 151 Sixth], designated by employees of carriers among others, to act for them in collective bargaining.

2.

Plaintiffs R. K. Doud, S. V. Cornstubble, O. L. Broom, C. R. Casey, P. R. Davis and E. E. Fuqua are individual employees of defendant Central Airlines, whose services

were terminated by defendant on or about April 7, 1958. Each of said individual plaintiffs is a resident of Tarrant County, Texas.

3.

Defendant, hereinafter sometimes called Central, is a corporation incorporated under the laws of the State of Nevada, and doing business in various states, including the state of Texas. It maintains its principal office at Amon Carter Field, Tarrant County, Texas. Central is a common carrier by air engaged in interstate commerce within the meaning of Section 201 of the Railway Labor Act [45 U. S. Code § 181].

4.

On March 14, 1957, pursuant to an election conducted by the National Mediation Board under the Railway Labor Act, [45 U. S. Code §§ 151-163, 181-188], case number [fol. 3] R-2135, International Association of Machinists was certified as the duly designated and authorized collective bargaining representative of Central's airline mechanics and stock and stores employees.

5.

Plaintiff International Association of Machinists and Central, as required by Section 2 of the Railway Labor Act [45 U. S. Code § 152], engaged in collective bargaining and signed a collective bargaining agreement on May 7, 1957.

6.

Said plaintiff International Association, and defendant Central, in accordance with statutory requirement [45 U. S. Code § 184], established a board of adjustment of jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of Section 3, Title I of the Railway Labor Act [45 U. S. Code § 153]. Said board is known as the Central-AM System Board of Adjustment.

In agreeing to the establishment of said System Board, the parties, on May 7, 1957, adopted the system board agreement which had previously been in effect between the Air Carrier Mechanics' Association, International, and Central Airlines, a true and correct copy of which is attached hereto and made a part hereof as Exhibit A.

8.

On June 18, 1958, the System Board of Adjustment met and conducted a hearing for the purpose of considering certain grievances which had been filed by plaintiffs Doud, [fol. 4] Cornstubble, Broom, Casey, Davis and Fuqua, and which had been processed in due course through the requisite preliminary steps. The System Board at that hearing was composed of two representatives of the company and two representatives of the union. The Board deadlocked, and therefore the parties requested the National Mediation Board to appoint a neutral fifth member to break the deadlock. Whereupon, Francis J. Robertson, of Washington, D. C., was duly appointed by the National Mediation Board to serve as such Neutral Referee. The Board, consisting of the two company members, two union members and the Referee, met at the Hilton Hotel in Fort Worth, Texas, on June 29, 1959, and heard the parties to the dispute. Thereafter, briefs were filed with the Board by both parties and considered by the Board meeting in executive session.

9.

On November 3, 1959, the Neutral Referee submitted an opinion and award, which was joined in by both union members of the Board. A true and correct copy of said opinion and award is attached hereto and made a part hereof as Exhibit B. Said award, became effective immediately when signed by a majority of the Board.

10.

Plaintiffs have requested that defendant comply with said award according to its terms; however, defendant has refused and continues to refuse to comply.

11.

As a result of defendants' failure, each individual plaintiff has suffered and will stand to suffer substantial dam-
[fol. 5] ages, including loss of wages from the date of their wrongful discharge, all of which is shown in greater detail in the award attached hereto, as Exhibit B.

12.

This Honorable Court has jurisdiction of this action under 28 U. S. Code § 1331, this being a matter in controversy exceeding the sum and or value of $10,000, exclusive of interest and costs, and arises under the laws of the United States, specifically under the Railway Labor Act as set out more particularly hereinabove.

Wherefore, Premises Considered, plaintiffs respectfully pray for enforcement of the aforesaid System Board Award, Exhibit B, and that judgment be entered ordering defendant to comply with said award, and for such other relief, special or general, at law or in equity, to which defendants, and each of them may be entitled.

Respectfully submitted,

Mullinax, Wells, Morris & Mauzy, 1610 National Bankers Life Bldg., Dallas 1, Texas; By Charles J. Morris.

Plato E. Papps, Chief Counsel, Int'l Association of Machinists, 1300 Connecticut Avenue, Washington 6, D. C.

[fol. 6]

EXHIBIT A TO COMPLAINT

Agreement Between Central Airlines, Inc. and the Air Carrier Mechanics in the service of Central Airlines, Inc. as Represented by the Air Carrier Mechanics Association International, Covering the Establishment and Maintenance of a System Board of Adjustment.

It is Mutually Agreed that:

(a) 1. The term "Company" as used herein shall be construed to mean Central Airlines, Inc.

2. The term "Association" as used herein shall be construed to mean the Air Carrier Mechanics Association, International.

3. The term "Mechanics' Agreement" as used herein shall be construed to mean the Agreement between Central Airlines, Inc. and the Air Carrier Mechanics in the service of Central Airlines, Inc., dated August 28, 1955, or any extension or renewal of that Agreement.

(b) In compliance with Section 204, Title II of the Railway Labor Act, as amended, there is hereby established a system board of adjustment for the purpose of adjusting and deciding disputes which may arise under the terms of the Mechanics' Agreement and any amendments or additions thereto and which are properly submitted to it, which Board shall be known as "Central Airlines, Inc. Mechanics' System Board of Adjustment", hereinafter referred to as the "Board".

[fol. 7] (c) The Board shall consist of four members, two of whom shall be selected and appointed by the Association and two by the Company, and such appointees shall be known as "Adjustment Board Members".

(d) The four members shall serve for one year from the date of their appointment or until their successors have been duly appointed. Vacancies in the membership of the Board shall be filled in the same manner as is provided herein for the selection and appointment of the original members of the Board.

(e) The Board shall have jurisdiction over disputes between any employee covered by the Mechanics' Agreement and the Company, growing out of grievances or out of interpretation or application of any of the terms of the Mechanics' Agreement. The jurisdiction of the Board shall not extend to proposed changes in hours of employment, rates of compensation, or working conditions covered by existing agreements between the parties hereto.

(f) The Board shall consider any dispute properly submitted to it by the President of the Association or by the Vice-President of Operations of the Company when such

dispute has not been previously settled in accordance with terms provided for in the Mechanics' Agreement. No matter shall be considered by the Board which has not first been handled in accordance with the appeals provisions of the Mechanics' Agreement, including the rendering of a decision thereon.

(g) Appointments of members of the Board shall be made by the respective parties within thirty (30) days from [fol. 8] the date of the signing of this Agreement and said appointees shall meet in the City of Fort Worth, Texas, within forty-five (45) days from the date of the signing of this Agreemen., and shall organize and select a Chairman and Vice-Chairman, both of whom shall be members of the Board. The term of office of Chairman and Vice-Chairman shall be one year. Thereafter, the Board shall designate one of its members to act as Chairman and one to act as Vice-Chairman for one-year terms. Each officer so selected shall serve for one year or until his successor has been duly selected.

The office of Chairman shall be filled and held alternately by an Association member of the Board and by a Company member of the Board. When an Association member is Chairman, a Company member shall be Vice-Chairman, and vice versa. The Chairman, or in his absence the Vice-Chairman, shall preside at meetings of the Board and at hearings and shall have a vote in connection with all actions taken by the board.

After the organization meeting referred to herein, the Board shall thereafter meet in the city where the general offices of Central Airlines, Inc. are maintained (unless a different place of meeting is agreed upon by the Board) during the first week in October and the first week in April of each year, provided that at such times there are cases filed with the Board for consideration, and shall continue in session until all matters before it have been considered, unless otherwise mutually agreed upon.

(h) All disputes properly referred to the Board for consideration, shall be addressed to the Chairman. Five copies of each petition, including all papers and exhibits in con- [fol. 9] nection therewith, shall be forwarded to the Chair-

man, who shall promptly transmit one copy thereof to each member of the Board. Each case submitted shall show:

1. Question or questions at issue.
2. Statement of facts.
3. Position of employee or employees.
4. Position of Company.

When possible, joint submissions should be made, but if the parties are unable to agree upon a joint submission, then either party may submit the dispute and its position to the Board.

(i) Upon receipt of notice of the submission of a dispute, the Chairman shall set a date for hearing, which shall be at the time of the next regular meeting of the Board, or, if at least two members of the Board consider the matter of sufficient urgency and importance then at such earlier date and at such place as the Chairman and Vice-Chairman shall agree upon, but not more than fifteen days after such request for meeting is made by at least two of said members, and the Chairman shall give the necessary notices in writing of such meeting to the Board members and to the parties to the dispute.

(j) Employees covered by the Mechanics' Agreement may be represented at Board hearings by such person or persons as they may choose and designate and the Company may be represented by such person or persons as it may [fol. 10] choose and designate. Evidence may be presented either orally or in writing, or both.

On request of individual members of the Board, the Board may, by a majority vote, or shall at the request of either the Association representatives or the Company representatives thereon, summon any witnesses who are employed by the Company and who may be deemed necessary by the parties to the dispute, or by either party, or by the Board itself, or by either group of representatives constituting the Board.

The number of witnesses summoned at any one time shall not be greater than the number which can be spared from

the operations without interferences with the services of the Company.

(k) A majority vote of all members of the Board shall be competent to make a decision.

(l) Decisions of the Board in all cases properly referable to it shall be final and binding upon the parties hereto.

(m) When a deadlock occurs in a case referred to the Board, it shall be the duty of the Board to endeavor to reach a decision, and, failing in this, to endeavor to agree within thirty (30) days upon a procedure for breaking such deadlock. In any case where the said System Board of Adjustment becomes deadlocked and unable to reach a decision upon a method for breaking the deadlock within the above-prescribed thirty (30) days, either the Company or the Association may petition the National Mediation Board for the appointment of a neutral referee to sit with the System Board of Adjustment, as a member thereof. Such Board of Adjustment, as then constituted, shall hear [fol. 11] the parties with reference to the dispute pending before it, and a majority vote of the Board shall be final, binding, and conclusive between the Company and the Association and anyone they may represent having an interest in the dispute. In case either the Company or the Association fails to petition the National Mediation Board within thirty (30) days after the thirty-day period prescribed in this paragraph for breaking deadlocks, the matter in question shall be deemed by all parties concerned to be ended and no action thereon shall be taken thereafter by either party.

(n) Nothing herein shall be construed to limit, restrict, or abridge the rights or privileges accorded either to the employees or to the employer, or to their duly accredited representatives, under the provisions of the Railway Labor Act, as amended, and the failure to decide a dispute under the procedure established herein shall not, therefore, serve to foreclose any subsequent rights which such law may afford or which may be established by the National Mediation Board by orders issued under such law with respect to

disputes which are not decided under the procedure established herein.

(o) The Board shall maintain a complete record of all matters submitted to it for its consideration and of all findings and decisions made by it.

(p) Each of the parties hereto will assume the compensation, travel expense, and other expenses of the Board members elected by it.

(q) Each of the parties hereto will assume the compensation, travel expense, and other expenses of the witnesses called or summoned by it. So far as space is available, [fol. 12] witnesses who are employees of the Company shall receive free transportation to the extent permitted by law. The Board will make every effort to hold its hearings and investigations at points that will best serve the purposes of satisfactorily concluding the work of the Board with the least amount of travel for the greatest number of persons attending the proceedings.

(r) The Chairman and the Vice-Chairman, acting jointly, shall have the authority to incur such other expenses as, in their judgment, may be deemed necessary for the proper conduct of the business of the Board and such expense shall be borne one-half by each of the parties hereto. Board members who are employees of the Company shall be granted necessary leaves of absence for the performance of their duties as Board members. So far as space is available, Board members shall be furnished free transportation over the line of the Company for the purpose of attending meetings of the Board, to the extent permitted by law.

(s) It is understood and agreed that each and every Board member shall be free to discharge his duty in an independent manner, without fear that his individual relations with the Company or with the employees may be affected in any manner by action taken by him in good faith in his capacity as a Board member.

(t) This Agreement shall become effective as of September 1, 1955, and shall continue in full force and effect until September 1, 1956, and shall renew itself without

change until each succeeding September 1, thereafter, unless written notice of intended change is served in accordance with Section 6, Title I, of the Railway Labor Act, as amended by either party hereto at least thirty days prior [fol. 13] to September 1, 1956, or any September 1, thereafter.

In Witness Whereof, the parties hereto have signed this Agreement this 28th day of August, 1955.

For CENTRAL AIRLINES, INC.,
(S) F. E. HOWE.

For THE AIR CARRIER MECHANICS IN THE SERVICE OF CENTRAL ARLINES, INC.,
(S.) GLYN R. JOHNS.

Witness:
(S) F. E. MANCUSO.

Witness:
(S) THOMAS L. DUNLEVY.

[fol. 14]

EXHIBIT B TO COMPLAINT

Central Airlines, Inc.—International Association

In the Matter of:

R. K. Doud, S. V. Cornstubble, O. L. Broome, C. R. Casey, P. R. Davis, and E. E. Fuqua.

Award

Grievances Nos. C-23 to C-28, C-30 to C-35 and each inclusive.

Preliminary Statement.

This proceeding comes about as a result of two separate grievances of each of six employees protesting their suspension and discharge by the Company. After progression through the grievance machinery provided for in the applicable Collective Bargaining Agreement (Agreement effective September 1, 1955 between Central Airlines and the

Air Carrier Mechanics Association International) and disallowance by the Company, the grievances were presented to the System Board of Adjustment consisting of two Company members and two Union members. After presentation of the grievances to the System Board of Adjustment as thus constituted the Board deadlocked upon the disposition of the cases and application was made to the National Mediation Board for the appointment of a neutral referee to sit as a member of the Board to break the deadlock.

Francis J. Robertson, of Washington, D. C., was duly appointed by the National Mediation Board as Neutral Referee. The Board, consisting of the two Company members, two Union Members and the Referee, met at the Hilton Hotel in Fort Worth, Texas, on June 29, 1959, and [fol. 15] heard the parties to the dispute. Thereafter, briefs were filed with the Board by both parties and considered by the Board meeting in executive session.

The following Appearances were noted:

For the Union:

Charles Morris, Esq., Dallas, Texas, Edward J. Hickey, Esq., Washington, D. C., Plato E. Papps, Esq., Mr. L. T. Faircloth, Dallas, Texas.

For the Company:

Karl Mueller, Esq., Forth Worth, Texas, Mr. R. L. Wageneck, Mr. Jack Michael.

Background of the Dispute.

At various times between 4:00 P.M. and 4:30 P.M. on Thursday, April 3, 1958 the six grievants involved in this dispute were requested to work overtime. In the case of Messrs. Doud, Fuqua, Broome and Davis it appears that the initial request was made by the shop steward. In the case of Messrs. Cornstubble and Casey it appears that the shop steward was accompanied by a crew chief when this request was made. All six of the employees refused, giving various reasons for such refusal. That same evening close to quitting time of 4:30 P.M. the crew chief delivered letters addressed jointly to Messrs. Doud, Cornstubble and Broome

to each of those men in which they were told that no one desired to work overtime and since they were the junior men in their department they were directed to work four hours overtime from 4:30 P.M. to 8:30 P.M. on April 3, 1958. Similar letters addressed jointly to Messrs. Fuqua, Casey and Davis were delivered by the crew chief to Messrs. [fol. 16] Fuqua and Casey on that same evening directing them to work four hours overtime from 4:00 A.M. to 8:00 A.M. on April 4, 1958. On Friday morning, April 4, 1958 Mr. Davis found his copy of the letter on his time card. About 8:30 P.M. on Friday, April 4, 1958, Mr. Davis was contacted on the telephone by Mr. Vaughan, Director of Maintenance. Mr. Vaughan told Mr. Davis that as the junior man in the sheet metal shop he was being requested to come in at eight o'clock the following morning, Saturday, April 5, 1958. About 10:15 or 10:30 P.M. that same Friday evening Mr. Vaughan, accompanied by Mr. Jack Michael of the Personnel Department, delivered a letter to Mr. Davis directing him to report on Saturday, April 5, 1958 to work on Aircraft 397.

No one of the six grievants complied with the directions to work overtime on either of the days involved. At various times on Friday evening, April 4, 1958 and Saturday, April 5, 1958 Mr. Vaughan, accompanied by Mr. Michael, delivered letters to each of the grievants, excepting Mr. Broome, notifying them of suspension from service and instructing them to report to the Office of the Director of Maintenance at 8:00 A.M. on Monday, April 7, 1958. Mr. Broome received the same type of letter upon reporting for work on Monday morning, April 7, 1958. These letters were all identically worded and dated April 4, 1958 with the exception of the letter to Mr. Davis, which was dated April 5, 1958. The letter read as follows:

"Dear Sir:

You were suspended from service, pending completion of the Company's investigation in respect of your failure to perform your work assignment as directed.

You are hereby instructed to report to the office of the Director of Maintenance at 8:00 o'clock A.M. on Monday, [fol. 17] April 7, 1958, for interview by the Company so

that your statement can be considered by the Company in determining what if any action is to be taken in this connection.

If the Company finds that you were not at fault, you will be returned to service and you will be made whole for any loss of pay that you may have suffered by reason of your suspension.

Yours very truly,

(S) D. S. VAUGHAN,
(D. S. Vaughan),
Director of Maintenance"

On Monday, April 7, 1958 Mr. George Neal, President of the Local Union, told Mr. Vaughan that he would appear for the grievants. Mr. Vaughan consulted with Mr. Wageneck, Vice-President Operations, and Mr. Wageneck spoke to Mr. Neal and advised him that a Union representative could not be present at the interview. Shortly thereafter, on the same morning, Mr. L. T. Faircloth, Grand Lodge Representative of the I.A.M., met with Mr. Wageneck and other Company representatives and discussed the question of the right of the individuals involved to Union representation. The Grand Lodge representative finally took the position that the men would not talk without a representative present. After Mr. Faircloth left the conference the Company representatives went down to the hangar in an apparent effort to talk to the grievants but they had already left the premises. Thereafter, on the same day, by registered mail, Mr. Wageneck forwarded a letter to each of the grievants informing them of their discharge. Except for the fact that the letter to Mr. Davis referred to his being directed to work overtime on Friday, April 4, 1958, the body [fol. 18] of the letter to each grievant was identically worded. The letter to Mr. Broome is illustrative and it read as follows:

"Mr. O. L. Broome
Star Route E, Box 351
Azie, Texas

Dear Mr. Broome:

On Thursday, April 3, 1958, you were directed to work overtime. You failed and refused to work such overtime.

"Thereafter, you were instructed to report to the office of the Director of Maintenance at 6:00 AM on Monday, April 7, 1958, 'for interview by the Company so that your statement can be considered by the Company in determining what, if any, action is to be taken in this connection.'

"While you came to the hangar at the time stated, you did not report as instructed. Instead, a representative of the International Association of Machinists informed us that he had advised you to refuse to talk to us. We then went to the hangar for the purpose of talking to you, to see whether or not you would give us a statement in respect to your failure and refusal to work overtime as directed. We found that you had left the property and we have had no word from you. We can only assume, in these circumstances, that you decided to refuse to talk to us about the matter.

"Your conduct in the premises leaves us no alternative except to terminate your services as of 10:99 AM., April 7, 1958.

Yours very truly,

S/S R. L. WAGENECK
(R. L. Wegeneck)
Vice-President, Operations"

[fol. 19] Each of the grievants filed a grievance form dated April 7, 1958 and received by the Company on April 8, 1958 each one of which read in pertinent part as follows:

"I was unjustly suspended from Central Airlines and I request that I be granted a hearing and that I be reinstated without loss of seniority and that I be made whole for all loss of pay.

"I request that this Hearing be held in accordance with Section 22 of the Agreement."

Another grievance form dated April 13, 1958 received by the Company on April 15, 1958 was filed by each of the grievants and each of those forms read in pertinent part as follows:

"I was unjustly dealt with by being suspended and denied Union representation at a hearing and then being terminated for insisting on my rights under Section 22 of the Current agreement to have Union representation present at this investigation. I hereby request a hearing on my discharge in accordance with the above mentioned Section and further request that I be reinstated without loss of seniority and that I be made whole for any loss of pay involved."

As noted in our Preliminary Statement, these grievances were all disallowed by the Company.

The above background suffices for an understanding of the issues involved in this proceeding and of the respective contentions of the parties. Other facts of record pertinent to a disposition of this dispute will be treated with as necessary in our Discussion below.

[fol. 20] Discussion.

We think it is clear from the outline of the facts which we set forth above that the main issue presented to the Board for determination is whether or not the Company was in violation of the Agreement in discharging the employees here involved. We shall, therefore, initially devote our consideration to a determination of that issue.

The governing Agreement between the parties was originally made between Central Airlines, Inc. and the Air Carrier Mechanics Association International effective September 1, 1955 and subsequently made applicable to the International Association of Machinists when that organization became the certified bargaining representative of the employees. The discipline section in that contract is numbered 22 and reads as follows:

"Section 22—Investigation and Discipline.

(a) Hearing:

1. An employee shall not be disciplined or dismissed from the service of the Company without notification in writing of such action. An employee who is disciplined or dismissed shall be entitled to an investigation and hearing thereon, provided that such employee makes written request for such investigation and hearing within seven (7) days after receiving such notification.

2. An employee may be held out of service by the Company pending such investigation and hearing and appeals therefrom.

3. Such written request for an investigation and hearing shall be addressed to the employee's immediate supervisor [fol. 21] with a copy to the Operations Manager of the Company.

4. Prior to such investigation and hearing, such employee shall be notified in writing by the Company of the precise charge or charges against him. He shall be given the necessary time, not exceeding seven (7) days, in which to secure the presence of witnesses and shall have the right to be represented by the employee of the Company of his choice or by his duly accredited representative or representatives.

5. Such investigation and hearing shall be held by a maintenance supervisor of the Company, designated by the Company for that purpose, and shall be held within seven (7) days after the receipt of the employee's written request therefor.

6. Within ten (10) days after the close of such investigation and hearing the Company shall announce its decision in writing and shall furnish the employee, or his duly accredited representative, a copy thereof.

(b) Appeal:

1. When a copy of such decision has been received by the employee or his duly accredited representative or representatives, and if such employee is dissatisfied with the

Company's decision, he shall have the right to appeal to the chief operating officer of the Company, provided such appeal request is filed by the employee in writing with the chief operating officer of the Company within seven (7) days from the date such employee receives a copy of the Company's decision of the first investigation and hearing provided in Paragraph (a) of this Section. Such appeal [fol. 22] hearing shall be held within seven (7) days after the receipt of the employee's written request therefor by the chief operating officer of the Company.

2. Within ten (10) days after the close of such investigation and hearing the Chief Operating Officer shall announce his decision in writing and shall furnish the employee or his duly accredited representative or representatives, with a copy thereof.

(c) General:

1. If any decision made by the Company under the provisions of this Section is not appealed by the employee affected within the time limit prescribed herein for such appeals, the decision of the Company shall become final and binding.

2. If, as a result of any hearing or appeal therefrom as provided herein, an employee is exonerated, he shall, if he has been out of service, be reinstated without loss of seniority and shall be paid for such time lost in an amount which he would have ordinarily earned had he continued in the service during such period.

3. If, as a result of any hearing or appeal therefrom as provided herein, the employee shall be exonerated, his personnel record shall be cleared of the charges.

4. When it is mutually agreed that a stenographic record is to be taken of the investigation and hearing in whole or in part, the cost will be borne equally by both parties to the dispute. In the event it is not mutually agreed that a stenographic report of the proceedings shall be taken, any written record available taken of such investigation and hearing made by either of the parties to the dispute shall [fol. 23] be furnished to the other party to the dispute

upon request, provided that the cost of such written record so requested shall be borne equally by both parties to the dispute.

5. After the appeal provisions hereinbefore provided have been complied with, further appeal by the employee, if made, shall be to the Central Airlines, Inc. Mechanics' System Board of Adjustment as provided for in the "Agreement between Central Airlines, Inc., and the Air Carrier Mechanics in the service of Central Airlines, Inc. as represented by the Air Carrier Mechanics Association, International, dated September 1, 1955, covering the establishment and maintenance of a System Board of Adjustment "provided such appeal is made within thirty (30) days from the date of receipt by the employee or his duly accredited representative of the decision of the Chief Operating Officer. All submissions to the System Board of Adjustment shall be made in conformity with Paragraph (h) of the Adjustment Board Agreement.

6. Nothing in this Agreement shall extend the right of investigation and hearing provided for in this Section to probationary employees."

The Company argues that the grievances concerning the alleged violation of the Agreement on April 7th in denying Union representation were not timely filed inasmuch as they were not received by the Company until April 15, more than seven (7) days after the alleged occurrence. On the other hand, the record reveals that the Company conceded that the grievances protesting the discharge were timely filed under Section 2? of the Agreement. Apparently, this contention goes to the right of the grievants to grieve over [fol. 24] the denial of Union representation at the "interview" scheduled for April 7. It is, however, the occurrence of the discharge which is the subject matter of the grievance and since it was the refusal of the employees to attend such "interview" when the Company had refused Union representation the question of whether or not Union representation was properly denied is inextricably bound into the discharge grievances. Since it is clear that the discharge grievances were timely filed it necessarily follows that this contention is lacking in merit.

The Company further argues that the discharge grievances were not appealed from Maintenance Director Vaughan to Vice-President Wageneck in accordance with the grievance procedure. At a System Board hearing on June 19, 1958 Mr. Frank Harvey, General Chairman of the I.A.M. on Central Airlines and employee member of this Board conceded that he had traced the signatures of the grievants on the appeal letters in his representative capacity. It is argued that the appeal provided for in Section 22, Paragraph 6 (a) must be filed by the employee. Paragraph 6 of Section 22 is somewhat ambiguously worded. It first provides that the Company shall furnish the employee or his duly authorized representative with a copy of its decision on the first step. It then provides that when a copy of the decision has been received by the employee or his duly authorized representative he shall have the right to appeal etc. within ten days from the date such employee receives a copy of the Company's decision. It would be absurd to hold that the failure of the duly accredited representative to deliver a copy of the Company's decision to the employee affected would indefinitely extend the time within [fol. 25] which to appeal. Clearly, the parties contemplated that receipt of the Company's decision by the duly authorized representative would be the equivalent of receipt by the employee involved and that the time within which to appeal would commence to run when either of them received the Company's decision. This clearly demonstrates that the intent of Paragraph 6 cannot be given full force and effect in a reading of one clause or one sentence disassociated from the context. The parties have used the terms "employee" and "duly authorized representative" indiscriminately and it is only logical to conclude from a reading of Paragraph 6 in its entirety that they intended that the duly accredited representative should be considered as standing in the shoes of the employee with respect to the procedural matters covered thereby. Furthermore, on general principles of agency it would appear that the action of the General Chairman need only be authorized to make it the action of the employee. Presumptively, as a duly authorized representative the General Chairman would have the necessary authority. There is nothing to show that his

authority was in any way repudiated or disclaimed by the employees involved. We, therefore, find no merit in this contention of the Company.

The Company further contends that the appeal to the System Board of Adjustment was not in accordance with the provisions of the Collective Bargaining Agreement. In support of this contention, the Company points to Article 22 (a)5 and to Paragraph (e) and (h) of the Agreement covering the Establishment and Maintenance of a System Board of Adjustment.

What we had to say with respect to the right of the duly authorized representative to appeal on behalf of the employee involved from the decision of the Company in the first step applies equally to the right of appeal to the [fol. 26] System Board of Adjustment. It is noted that Paragraph 5 of Section 22 provides that such appeal must be made within 30 days from the date of receipt by the employee or his duly accredited representative, which is another manifestation of the parties' concept of the duly accredited representative in effect being the equivalent of the employee insofar as the procedural aspects of Section 22 are concerned.

Paragraphs (e) (f) and (h) of the System Board of Agreement provide as follows:

"(e) The Board shall have jurisdiction over disputes between any employee covered by the Mechanics' Agreement and the Company, growing out of grievances or out of interpretation or application of any of the terms of the Mechanics' Agreement. The jurisdiction of the Board shall not extend to proposed changes in hours of employment, rates of compensation, or working conditions covered by existing agreements between the parties hereto.

"(f) The Board shall consider any dispute properly submitted to it by the President of the Association or by the Vice-President of Operations of the Company when such dispute has not been previously settled in accordance with terms provided for in the Mechanics' Agreement. No matter shall be considered by the Board which has not first been handled in accordance with the appeals provisions of the

Mechanics' Agreement, including the rendering of a decision thereon.

"(h) All disputes properly referred to the board for consideration shall be addressed to the Chairman. Five copies of each petition, including all papers and exhibits in connection therewith, shall be forwraded to the Chair- [fol. 27] man, who shall promptly transmit one copy thereof to each member of the Board. Each case submitted shall show:

1. Question or questions at issue
2. Statement of facts
3. Position of employee or employees
4. Position of Company

When possible, joint submissions should be made, but if the parties are unable to agree upon a joint submission, then either party may submit the dispute and its position to the Board."

The Company contends that the Petition for System Board hearing does not accord with these provisions of the Agreement because:

"(1) It was not submitted by the alleged grievants or by the "President of the Association" (See J (f);

(2) it did not include or submit "all papers and exhibits in connection therewith" (See J (h);

(3) it does not contain a "Statement of facts" and that which is set forth under such heading is stated to be "The facts of the Union's case * *" and not of the purported grievants;

(4) it does not contain a statement of the "Position of employee or employees" but instead purports to state the "Position of the Union"; by reason of which such petition [fol. 28] did not effect an appeal or submission of the purported grievances to the Board."

We do not view Paragraph (e) of this Agreement as constituting a requirement that the appeal to the System Board of Adjustment must be personally signed by the

employee involved. It is an expression of the scope and extent of the jurisdiction of the Board. Paragraph (f) does not appear to apply to the situation here present since as we have already indicated the dispute was properly appealed under Section 22 (e)5. The petition sets forth sufficient facts for the Board to be fully acquainted with the matter in dispute and intelligently act upon it. Those are the apparent purposes of the requirements of Paragraph (h) of the System Board Agreement. The fact that the Position is stated as that of the Union rather than of the employee or employees is not a fatal defect. The Union as the duly accredited representative may act for the employee and certainly acts for the employees as a unit. That the petition did not include or submit all papers in connection therewith is also not fatally defective. It had a reference to the prior proceedings and papers which clearly identified them as the papers involved and they were all in the Company's possession. Clearly, the Company could not be prejudiced nor surprised in any way at the System Board hearings on this score.

The above discussion covers the jurisdictional and procedural objections raised by the Company. Having found them to be of no merit, we conclude that the dispute is properly before the Board for disposition on the merits.

In sum, the Company argues that the grievants were not entitled to Union representation at the "interview" before [fol. 29] Mr. Vaughan on April 7, 1958 because that was not an investigation or hearing such as is provided for in Section 22 of the Agreement. In support of this contention, in the main the Company asserts that it was made crystal clear in the written instructions to report to Mr. Vaughan that the Company was making its own investigation to determine what, if any, action it should take and that no determination had yet been made concerning the fault of the employee or the assessment of discipline, that no discipline had been imposed, that no griveance had been filed at that time and that no request had been made for an investigation or hearing by any of the grievants pursuant to the provisions of Section 22. The Company, therefore, concludes that the grievants had no right to refuse to com-

ply with the instructions to report for interview and that there is no support or justification in fact or law for their exoneration.

In sum, the Union argues that it is obvious that disciplinary action had been taken by the Company in suspending the grievants from service pending investigation, that it is clear from Paragraph 1 of Section 22 that an employee who is either disciplined or dismissed is entitled to an investigation and hearing thereon if he makes timely request therefor, that the Company short-circuited the normal procedure by scheduling an investigation and hearing, that the only investigation and hearing in the contemplation of Section 22 is the one to which an employee is entitled if he is disciplined or dismissed and consequently the right to representation attached to the "interview" in Mr. Vaughan's office on April 7, 1958. The Union further argues that many decisions of arbitrators support the proposition that employees are entitled to Union representation in discussion with the Company concerning matters relating to [fol. 30] their employment or work performance even without the formalization of a disciplinary suspension.

It is difficult to find any basis for the Company's assertion that no disciplinary action had been taken against the grievants before the time of the scheduled "interview" with Mr. Vaughan on April 7, 1958. The suspension letters the body of which we quoted under our heading "Background of the Dispute" clearly indicated that the employees were suspended. Those letters further concluded with a paragraph which stated that if the Company found that the grievants were not at fault, they would be returned to service and would be made whole for any loss of pay they may have suffered by reason of their suspension. It is difficult to conceive of any statement which would establish more clearly that, as of the time Mr. Vaughan wrote those letters, the Company considered the grievants as suspended without pay pending a determination of their fault or lack of it. The irrefutable implication is that if they were found at fault the suspension would be without pay and continued indefinitely. In any disciplinary proceeding it follows as day follows night that if an employee is found not at fault

he will be made whole for losses sustained. The concluding paragraph of the letter therefore in effect re-emphasizes the disciplinary nature of the suspension. If further substantiation is needed for the conclusion that disciplinary action was contemplated by the Company and put into effect by the issuance of the suspension letters, it can be found in the testimony of Mr. Wageneck and Mr. Vaughan before the Special Board of Adjustment on June 18, 1958. Mr. Wageneck, speaking of a conversation with Mr. Vaughan prior to the issuance of the suspension letters stated " * * * but, if I remember, I told Dave, I said, 'There's no use to ask the [fol. 31] people to work overtime. In my opinion it is concerted action. I will give you the answers as to what we are going to do with these people. But my thinking is at this time that we will suspend them'." Mr. Vaughan, during the course of examination by Union counsel, testified as follows:

"Q. Now, these letters advised the employees that they were suspended. Is that correct?

A. That is correct.

Q. And what do you mean by suspended? That meant out of service, did it not?

A. That is correct.

Q. Now, these employees were not put to work on Friday —I mean on Saturday, were they?

A. No, sir.

Q. They were not put to work on Saturday and they were not put to work on Monday, either, were they?

A. That's correct.

Q. Were they paid for any time Monday?

A. No, sir.

Q. You considered them suspended as of Monday and any time that they came on Monday was simply, so far as you were concerned, to report for a hearing. Is that correct?

A. That is correct.

Q. Which would not be on company time, but which would be outside of time for which they would be paid. Is that correct?

A. That is correct."

The only provision of the Agreement covering investigation and hearing following discipline is found in Section 22. This Section clearly indicates that the Company may take disciplinary action without the formality of a hearing or an [fol. 32] investigation. It would be entirely destructive of the rights afforded the employees under Section 22 to say that the Company may discipline an employee, call the employee in for an interview on the subject matter forming the basis for the discipline and then say to him "You are not entitled to representation because this is not a hearing under Section 22 since you did not make a request for it." Regardless of the fact that the Company called the scheduled session of April 7, 1958 in Mr. Vaughan's office an "interview" it is quite clear that it was to be a hearing on the grievants' failure to perform work assignments as directed. As a matter of fact, Mr. Vaughan looked upon it as a hearing, as is evidenced by that part of his testimony quoted above. In effect, what happened here was that the Company "jumped the gun" on the procedure set forth in Section 22(a). In doing so, it cannot be heard to say that the employees involved had no right to Union representation at the hearing. Manifestly, to hold otherwise in the circumstances of this case would render completely worthless the rights of the employee as set forth in Section 22(a)4.

We can only conclude that the Company's refusal to allow the grievants the right of representation at the hearing scheduled for April 7, 1958 was in violation of Section 22 of the Collective Bargaining Agreement. Under the circumstances of this case, since it was clear that such representation was to be denied to them, it would have been a vain act for them to attend the hearing in the Vaughan office without representation since any action which might be taken by the Company as a result of the hearing would have been null and void. In other words, this was not an "obey now and grieve later" situation. It follows that [fol. 33] the discharge of the grievants was in violation of the contract and the grievances should be sustained.

Since we have found that the discharge was unjustified, there is no reason to consider the suspension grievances because they were in effect merged into the discharge

grievance. This also renders unnecessary a consideration of the varying contentions of the Union and the Company with respect to the right of the Company to require the grievants to work overtime. We pass no judgment on the merit or lack of merit in those contentions. Neither do we pass judgment upon the attitude of the grievants in refusing to work overtime or the action taken by the union subsequent to the suspensions.

Award.

The grievances of April 13, 1958 of Messrs. R. K. Doud, S. V. Cornstubble, O. L. Broome, C. R. Casey, P. R. Davis and E. E. Fuqua are sustained. They are entitled to reinstatement without loss of seniority and should be made whole for any loss of pay involved as requested in the grievances filed with the Company as provided in the Collective Bargaining Act.

(S.) FRANCIS J. ROBERTSON,
Neutral Referee,

(S.) FRANK G. HARVEY,
Union Member,

(S.) DAN G. BLUE,
Union Member,

[fol. 34]

F. E. HOWE,
Company Member,

HAROLD MUELLER,
Company Member.

Dated Washington, D. C.
November 3, 1959.

In United States District Court

Motion to Dismiss and Answer Subject Thereto— Filed December 17, 1959

To the Honorable Judge of the United States District Court for the Northern District of Texas, Fort Worth Division:

Now comes the defendant Central Airlines, Inc., and files this its motion to dismiss, and subject to said motion, its answer to the plaintiffs' complaint, and for grounds for same would respectfully show the Court the following:

1.

Defendant respectfully moves this Court to dismiss the above styled action because, as appears from the complaint, the Court has no jurisdiction for the reason that the action is between citizens of the State of Texas and presents for determination by this Court no question arising under the Constitution, laws or treaties of the United States, or otherwise within the jurisdiction of the Federal District Courts.

[fol. 35] Wherefore, the defendant respectfully prays that the plaintiffs' action be dismissed, and that the defendant be discharged with its costs.

2.

Subject to the foregoing motion to dismiss, the defendant moves the Court to dismiss herefrom the plaintiff International Association of Machinists for the reason that such labor organization has no interest in the cause of action herein asserted nor is it entitled to recover any sum even if a cause of action be asserted and has therefore no justifiable interest in this controversy and is not a proper party hereto.

Wherefore, the defendant prays that such International Association of Machinists be dismissed herefrom.

Answer.

Subject to the motion to dismiss, the defendant files this its answer to the plaintiffs' original complaint on file herein and for such answer would respectfully show the Court the following:

1.

Defendant admits the allegations of Paragraph 1 of plaintiffs' complaint.

2.

Defendant admits that the plaintiffs R. K. Doud, S. V. Cornstubble, O. L. Broom, C. R. Casey, P. R. Davis and E. E. Fuqua, were employees of the defendant Central Air-[fol. 36] lines until April 7, 1958, on which date the services of each of the named plaintiffs were terminated. Defendant likewise admits that each of the named plaintiffs are residents of Tarrant County, Texas.

3.

Defendant admits the allegations of Paragraph 3 of the plaintiffs' original complaint.

4.

Defendant admits the allegations of Paragraph 4 of the plaintiffs' original complaint.

5.

Defendant admits the allegations of Paragraph 5 of plaintiffs' original complaint.

6.

Defendant admits the allegations of Paragraph 6 of plaintiffs' original complaint, insofar as said allegations go, but would show the Court that the System Board of Adjustment was established by the Air Carrier Mechanics' Association and the defendant Central Airlines, Inc., solely by means of a written contract and agreement dated August 28, 1955, which contract defines and limits the jurisdiction

of the System Board of Adjustment thereby established. It is shown to the Court that while the System Board of Adjustment was authorized by the Railway Labor Act, it exists and derives its authority solely by means of the con-
[fol. 37] tract between the parties of August 28, 1955, which contract by its terms specifically establishes said Board of Adjustment and outlines the mechanics and procedure for the hearing of disputes by said Board. The System Board of Adjustment is in actuality a creature of contract and not of federal statute.

7.

Defendant admits the allegations contained in Paragraph 7 of plaintiffs' original complaint.

8.

Defendant admits the allegations contained in Paragraph 8 of plaintiffs' original complaint, except that the defendant denies the allegation of such paragraph reading, "and which had been processed in due course through the requisite preliminary steps."

9.

Defendant admits that part of Paragraph 9 of the original complaint which alleges that on November 3, 1959 an award in the case was handed down by the "neutral referee," which award was joined in by both union members of the Board. However, the defendant denies that the award was effective immediately when signed by a majority of the Board, for the reason that said award was null and void and of no force and effect ab initio.

10.

Defendant denies the allegations contained in Paragraph 10 of plaintiffs' original complaint.

[fol. 38]

11.

Defendant denies the allegations contained in Paragraph 11 of the original complaint.

12.

Defendant denies the allegations contained in Paragraph 12 of the original complaint.

13.

The purported award is void and unenforceable and neither creates nor is a basis for the cause of action asserted, or any other cause of action against this defendant, for each of the following reasons:

(a) The System Board had no jurisdiction or authority to entertain or pass on the purported discharge grievances for the reason that they were not appealed in accordance with the requirements of the Mechanics' Agreement which was a condition precedent to the acquisition of jurisdiction by such Board.

(b) The purported award is in excess of the jurisdiction and authority of such Board for the reason that it purports to set aside and change express and unambiguous provisions of the governing Agreements and to go outside the provisions of such Agreements in an unsupported and unlawful attempt to sustain jurisdiction and the purported discharge grievances.

(c) The "Neutral Referee" in the preparation of his opinion and purported award and in making the findings and conclusions therein set forth, in which H. G. Harvey [fol. 39] and Dan Blue, representatives of the International Association of Machinists, have joined, ignored and failed and refused to take into account or give effect to admissions and declarations against interest made by plaintiffs or in their behalf, and uncontradicted and unimpeached evidence and testimony which if given effect would destroy the conclusions upon which the purported award is sought to be based, all of which constitutes arbitrary and capricious conduct, gross error, not an honest judgment, and a legal fraud in respect to Central's rights, thereby rendering such purported award a nullity and unenforceable.

(d) The findings and conclusions on which the purported awards are based are not supported by and are contrary to the substantial evidence and are merely disingenuous carvings and distortions of the evidence referred to amounting to and constituting palpable gross error, arbitrary action, and a legal fraud in respect to Central's rights, thereby rendering such purported award a nullity and unenforceable.

(e) The purported award is void and unenforceable and in excess of the jurisdiction and authority of the Board in that it purports to impose conditions, limitations and restrictions on the rights of Central and on the exercise thereof and otherwise to fix and prescribe the same, all outside the governing agreements and without any semblance of right or authority so to do.

(f) The purported award is void and unenforceable for the reason that it does not dispose of the issues presented, assuming without admitting jurisdiction, particularly, among others, in respect to the failure and refusal of the [fol. 40] individual plaintiffs to comply with orders to work overtime which gave rise to the entire controversy and which the purported award ignores completely by not passing thereon and by directing the reinstatement of the individual plaintiffs without regard thereto, notwithstanding the governing Agreement provides for reinstatement only in the event the employee is exonerated.

(g) The purported award is arbitrary and capricious, and evidences and is based upon partiality, misconduct and gross mistake, in fraud of Central's rights.

For each and all of the foregoing reasons and grounds the award is void and unenforceable and gives no cause of action and plaintiffs are not entitled to recover thereon.

Wherefore, Premises Considered, the defendant prays that this cause of action be dismissed, or, in the alternative, that the International Association of Machinists be dismissed herefrom, or in the event that such cause of action be not dismissed, that on final hearing the plaintiffs recover nothing herein and that this Court adjudge the award to be

void and without full force and effect, and for such other relief as may be just and necessary under the circumstances.

Respectfully submitted,

Hudson, Keltner, Jordan & Cunningham, By Walter E. Jordan,

1313 Continental Life Building,
Fort Worth 2, Texas.

[fol. 41] Karl H. Mueller,
Attorneys for Defendant.

Burk Burnett Building,
Fort Worth, Texas.

Certificate of service (omitted in printing).

IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed December 17, 1959

To the Honorable Judge of Said Court:

Now comes Central Airlines, Inc., the defendant in the above case, and files this its motion to dismiss, and for such motion respectfully shows the Court the following:

1.

The defendant, as shown on the face of such pleading, is a Nevada corporation with its principal office at [fol. 42] Amon Carter Field in Tarrant County, Texas, and is, under the applicable federal statutes, a citizen of Texas, and the plaintiffs Cornstubble, Broome, Casey, Davis and Fuqua are also citizens of the State of Texas and therefore there is no diversity of citizenship such as would give this Court jurisdiction of this cause.

2.

As the complaint herein, with the exhibits thereto attached, shows this suit is brought by the individual plain-

tiffs to enforce an award by an arbitrator (or neutral referee) pursuant to a contract and presents no cause of action arising under the Constitution or the laws of the United States and there is no substantial federal question.

3.

In the alternative and in the event that the whole cause of action is not dismissed, defendant prays that the International Association of Machinists a named plaintiff, be dismissed herefrom because said complaint on its face shows that such labor organization has no justiciable interest in this controversy, could recover nothing herein and that the only recovery herein, if any recovery there could be, would be in behalf of the named plaintiffs and such labor organization therefore has no interest in the cause of action asserted and no justiciable right to be a party herein.

Wherefore, Premises Considered, the defendant prays that the entire cause of action be dismissed for want of jurisdiction, or, in the alternative, if the whole cause of [fol. 43] action be not dismissed then the International Association of Machinists be dismissed herefrom as a party plaintiff, or for such relief as may be just under the circumstances.

Hudson, Keltner, Jordan & Cunningham, By Walter E. Jordan,

1313 Continental Life Building,
Fort Worth 2, Texas.

Karl H. Mueller,
Attorneys for Defendant.

Burk Burnett Building,
Fort Worth, Texas.

Certificate of service (omitted in printing).

[fol. 44]

IN UNITED STATES DISTRICT COURT

REPLY TO MEMORANDUM BRIEF OF CENTRAL AIRLINES, INC.—Filed January 4, 1960

To the Honorable Judge of Said Court:

Central Airlines, Inc., Defendant in the first of the above cases and plaintiff in the second, hereinafter called Central, has filed a memorandum alleging the absence of a Federal question in these cases. It relies upon Metcalf vs. National Airlines [38 CCH Labor Cases P65,978] decided by the U. S. Court of Appeals for the Fifth Circuit December 1, 1959. That case was thus decided one day after the International Association of Machinists, et al., hereinafter referred to as I.A.M., filed Civil Action No. 4220 and removal was effected in Civil Action No. 4221. The Fifth Circuit in the Metcalf case reaffirmed its decision in Sigfrad vs. Pan American World Airways 230 F.2d 13, and stated that "The law to be applied in determining the reviewability of the award was Federal rather than State law. We did not consider the question whether the State or Federal Court was the proper forum to entertain the action." In Metcalf the Court did not have before it the same jurisdictional questions requiring construction of the Railway Labor Act as are present in the instant case. We submit that this distinction is vital.

Central alleged in its brief that it "not only did not make any mention of any federal law, the Railway Labor Act or any other, specifically, but it did not even raise the Railway Labor Act or any other federal act by implication." [fol. 45] This is not correct. Central relied upon, incorporated by reference, and quoted in full, the System Board Agreement between the parties (Exhibit B to its petition) which incorporated the Railway Labor Act, and writes thereunder, in paragraph (n) thereof, reading in part as follows: "nothing herein shall be construed to limit, restrict, or abridge the rights or privileges accorded either to the employees or to the employer, or to their duly accredited representatives, under the provision of the Rail-

way Labor Act, as amended . . . " Furthermore, Central affirmatively alleged, by quoting paragraph (b) of the same Exhibit B that said System Board was established "in compliance with Section 204, Title II, of the Railway Labor Act, as amended. . . . "

The aforesaid references to the Railway Labor Act are not surplusage in determining the validity of the System Board award in question. On the contrary a construction of the Railway Labor Act is absolutely necessary in considering said award, because the conduct of which the System Board found Central guilty was the deprivation of union representation at a grievance hearing. The individual employee's rights to union representation flow not alone from the direct language of the collective bargaining agreement but also from the language of the Railway Labor Act incorporated in the agreement by references, for example see the sections of the Railway Labor Act affirmatively cited and relied upon in the petition for removal, pages 3, 4 and 5.

Thus, this case differs substantially from the Metcalf case for the instant case cannot be decided without determining the employees' rights of union representation in the [fol. 46] circumstances. Such determination must be made based upon contract and federal statute for such rights ultimately derive from federal statute.

Central is incorrect in alleging that only private rights derived from contract are involved. This is especially so in view of the deprivation of rights of union representation at issue in the case. But it is generally also true as noted in Edwards vs. Capitol Airlines, 176 F.2d 755, 84 U. S. App. D. C. 346, Cert. den. 70 S.Ct. 186, 338, U. S. 885, 94 L.Ed. 543 in which the Court held, in reviewing the action of a similarly created system board of adjustment 176 F.2d 755, 760:

"This Board is not the Railway Adjustment Board, whose functions and power are fixed by the statute. This is a board created by contract. But the right to create it was reserved to the parties by the original Act, and A DUTY TO CREATE IT WAS IMPOSED, BY A LATER AMEND-

MENT, UPON EVERY CARRIER AND * * * ITS EMPLOYEES, ACTING THROUGH THEIR REPRESENTATIVES.' THIS GIVES IT A PUBLIC CHARACTER THAT CANNOT BE IGNORED." (Emphasis added.)

We submit that a federal question is involved in these law suits. Therefore, this Honorable Court should retain jurisdiction based upon such federal question. We are, of course, aware of the fact that Central Airlines, Inc. is a Nevada corporation and that the petition for remand could have been based upon diversity jurisdiction; however, we sought to invoke federal jurisdiction on the one ground which we deem important in view of the fact that it is our [fol. 47] position that a federal question is involved and a federal statute must be construed in connection with this case. We do not seek jurisdiction here on grounds of diversity, because we are certain that our state judges will provide us a fair and capable forum for adjudication of the issues in these cases. We certainly do not feel that I.A.M. or any of the grievants will be prejudiced in any way by virtue of their cases being decided in the state Courts. Therefore, the single reason for invoking jurisdiction of this Honorable Court is the existence of the federal statute which must be construed and we seek determination of these federal rights through the federal Courts.

We wish to note one further item. Although Central sought to dismiss the I.A.M. from case No. 4220 as a party plaintiff, we note that no argument in support of that position is contained in its memorandum brief. It is really too plain for argument that the union is a proper party to the law suit for the reason that the contract on which Central claims its action is based is with the I.A.M. and not with individual employees. The I.A.M., pursuant to the Railway Labor Act, is their exclusive bargaining representative and it is the acts of the I.A.M. which Central alleges as reason for the System Board of Adjustment award being invalid. Obviously, the union has a justiciable interest in the proceeding.

For reasons stated hereinabove, the I.A.M. and the grievants involved pray that this Honorable Court retain jurisdiction.

Respectfully submitted,

Mullinax, Wells, Morris & Mauzy,
[fol. 48] 1610 National Bankers Life Bldg.,
Dallas 1, Texas.

By Charles J. Morris, Plato E. Papps, Chief Counsel, Int'l. Association of Machinists, Attorneys for Defendants.

1300 Connecticut Avenue,
Washington 6, D. C.

IN UNITED STATES DISTRICT COURT

ORDER OF DISMISSAL—Entered January 15, 1960 and Filed January 18, 1960

In the District Court of the United States for the Northern District of Texas, Fort Worth Division.

Civil Action No. 4220

INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, R. K. DOUD, S. V. CORNSTUBBLE, O. L. BROOM, C. R. CASEY, P. R. DAVIS and E. E. FUQUA,

VS.

CENTRAL AIRLINES, INC.

On the 4th day of January, 1960, the motion to dismiss the above styled and numbered cause of action filed by the defendant herein, was presented to the Court for hearing, and all parties herein appeared by and through their at-

torneys of record. The defendant's motion to dismiss this cause was based on the premise first that there was no diversity of citizenship for the reasons that all parties herein are citizens and residents of the state of Texas, and next [fol. 49] that this action presents for determination by this Court no question arising under the Constitution, laws or treaties of the United States, or otherwise within the jurisdiction of the Federal District Courts. The Court, after hearing oral argument of counsel for all parties, and after considering the pleadings of the parties, including the defendant's motion to dismiss, and briefs filed herein by both parties, is of the opinion that the defendant's motion to dismiss the above styled and numbered cause of action should be sustained and granted by this Court.

It is Therefore Ordered, Adjudged and Decreed that the above styled and numbered cause of action be, and it is hereby dismissed, from the docket of this Court, for the reasons that there is no diversity of citizenship involved, and that further there is no federal question involving the Constitution, laws or treaties of the United States which would confer jurisdiction upon this Court, and it is further ordered, adjudged and decreed that all costs of Court be taxed against the plaintiff herein.

Signed and Entered this 15 day of January, 1960.

T. Whitfield Davidson, Judge, District Court of the United States for the Northern District of Texas, Fort Worth Division.

[fol. 50]

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed February 12, 1960

In the United States District Court for the Northern District of Texas, Fort Worth Division.

Civil Action No. 4220

INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, R. K. DOUD, S. V. CORNSTUBBLE, O. L. BROOM, C. R. CASEY, P. R. DAVIS and E. E. FUQUA, Plaintiffs,

vs.

CENTRAL AIRLINES, INC., Defendant.

Formal notice is hereby given, that International Association of Machinists, AFL-CIO, R. K. Doud, S. V. Cornstubble, O. L. Broom, C. R. Casey, P. R. Davis and E. E. Fuqua, the above named plaintiffs, hereby appeal to the Court of Appeals for the Fifth Circuit from the order of dismissal in said cause entered on the 15th day of January, 1960.

Dated: February 12, 1960.

Mullinax, Wells, Morris & Mauzy,
1601 National Bankers Life Bldg.,
Dallas 1, Texas.

By Charles J. Morris.

This is to certify that the foregoing notice of appeal was sent by mail to all of the parties to the proceeding through their attorneys as follows:

Hudson, Keltner, Jordan & Cunningham, 1313 Continental Life Building, Fort Worth 2, Texas.

[fol. 51] Mueller & Mueller, Burk Burnett Building, Fort Worth, Texas, Charles J. Morris.

* * * * * * *

Bond on appeal for $250.00 filed February 12, 1960 (omitted in printing).

[fol. 53]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL—Filed March 16, 1960 (omitted in printing)

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[fol. 54] Clerk's Certificate to foregoing transcript (omitted in printing).

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[fol. 55]

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—November 7, 1960 (omitted in printing)

[fol. 56]

IN UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 18286

INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, R. K. DOUD, S. V. CORNSTUBBLE, O. L. BROOM, C. R. CASEY, P. R. DAVIS and E. E. FUQUA, Appellants,

versus

CENTRAL AIRLINES, INC., Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

OPINION—October 13, 1961

Before RIVES, BROWN, and WISDOM, Circuit Judges.

WISDOM, Circuit Judge: The sole issue here is whether a federal court has jurisdiction of this suit as one arising under the laws of the United States.

The International Association of Machinists, AFL-CIO, the certified bargaining representative of Central Airlines' mechanics and stock and stores employees, joined by six [fol. 57] aggrieved employees, sued Central Airlines, Inc. in the United States District Court for the Northern District of Texas. The plaintiffs ask for enforcement of an award rendered by a system board of adjustment (arbitration). There is no diversity of citizenship. As to jurisdiction, the complaint alleges only that the court has jurisdiction of this action under 28 U. S. Code Section 1331,[1] "this being a matter . . . [that] arises under the laws of the United States, specifically under the Railway Labor Act." The district court dismissed the suit for lack of jurisdiction. We affirm.

Central Airlines and the Union entered into a System Board Agreement in accordance with Section 184 of the Railway Labor Act[2] imposing a duty on every air carrier

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[1] The federal question problem is the same under § 1337 as under § 1331, except that § 1331 is somewhat more general and the amount in controversy must exceed $3000 (now $10,000). 62 Stat. 930 (1948), 28 U.S.C.A. § 1331 provides: "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States." Prompted by questions from the court during oral argument, counsel for appellants filed a supplemental brief devoted in part to the contention that jurisdiction exists also by virtue of 28 U.S.C.A. § 1337. Section 1337 provides: "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

[2] 44 Stat. 577 (1926) as amended to apply to the airline industry by 49 Stat. 1189 (1936), 45 U.S.C.A. §§ 151-88. Section 184 provides:

> "The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on April 10, 1936, before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief operation officer of the carrier designated to handle such disputes; but, failing to

[fol. 58] and its employees, acting through their representatives, to establish a board of adjustment to settle disputes "growing out of grievances or out of the interpretation or application of any of the terms of [the collective bargaining agreement]". Pending the establishment of a permanent national board, similar to the National Railroad Adjustment Board, airlines and their employees are dependent upon contract for the establishment of adjustment boards.[3] Section 184 does not define the jurisdiction of a board, except to the extent of providing that a board shall have "jurisdiction not exceeding the jurisdiction which may be exercised by system, group, or regional boards of adjustment, under the authority of Section 153 of this title".[4] It is clear, therefore, that although the statute requires the parties to establish a board, without a contract there would

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reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.

It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of sections 181-188 of this title, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 153 of this title. . . ."

Section 153, Second permits any carrier and its employees to agree "to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section." Section 153 (i) provides that "[t]he disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions . . . may be referred . . . to the appropriate division of the Adjustment Board. . . ."

[3] In referring to a similar airline system board the court said: "This Board is not the Railway Adjustment Board, whose powers and functions are fixed by the statute. This is a Board created by contract." Edwards v. Capital Airlines, D. C. Cir., 1949, 176 F. 2d 755, 760. See also National Airlines v. Metcalf, 5 Cir., 1959, 271 F. 2d 817.

[4] See footnote 2.

[fol. 59] be no board. It is also clear that the parties must look to the contract for the composition, procedures, and jurisdiction (within Section 153) of an airline system board of adjustment.

In April 1958 Central discharged six of its employees, the individual plaintiffs, because they refused, while under suspension from the Company, to attend a hearing at which the Company denied them the right to have a union representative present. The discharged employees went through the preliminary stages of a formal grievance proceeding without reaching settlement, and the Union appealed the case to the system board of adjustment. The board, composed of two company representatives and two union representatives, deadlocked on the case. The National Mediation Board then appointed a neutral referee. The five-member board held that Central's refusal to allow the grievants the right of representation and the discharge of the grievants violated the collective bargaining agreement. The board rendered an award ordering that the six discharged employees be reinstated without loss of seniority and with full pay during the term of their attempted discharge. Central refused to comply with the award on the ground that the board exceeded its jurisdiction and authority as set forth in the "Governing Agreement" between the parties "covering the establishment and maintenance of a System Board of Adjustment".

I.

The appellants' broadest contention, based on *Textile Workers* v. *Lincoln Mills*, 1957, 353 U. S. 448, 77 S. Ct. 912, 1 L. Ed. 2d 972, is that the rights asserted in their com- [fol. 60] plaint are necessarily federal rights flowing from federal law. The argument runs something like this: just as the Labor Management Act is a congressional mandate to federal courts to fashion federal law governing the substance of collective bargaining agreements under that act, the Railway Labor Act is a direction to create a body of substantive federal law governing the substance of collective bargaining agreements in the airline industry; the plaintiffs' cause of action comes from this new body of

federal substantive law. Appellants recognize, of course, that Section 301 of the Labor Management Relations Act excludes any persons covered by the Railway Labor Act, but they contend that the two statutes, construed together, show a consistent statutory pattern.

A crucial difference between two statutes may be more significant than similarities. So it is here. Section 301 of the Labor Management Relations Act provides specifically for federal district court jurisdiction over suits involving collective bargaining agreements in industries affecting interstate commerce.[5] It was this provision that the Supreme Court interpreted in Lincoln Mills as "more than jurisdictional". In itself it was the statutory source for the congressional direction that federal courts "fashion a body of federal law for the enforcement of collective bargaining agreements". 353 U. S. 448, 451. But there is no specific [fol. 61] statutory provision for district court jurisdiction over suits under Section 184 of the Railway Labor Act. Since Section 184 has no express grant of jurisdiction that is "more than jurisdictional" and has no language even remotely equivalent to Section 301, Section 184 of the Railway Labor Act lacks the foundation on which the Court, in Lincoln Mills, based its decision that federal law (even if it were necessary to fashion a body of federal law) governs the substance of collective bargaining agreements under the Labor Management Act.

It is also clear that Congress did not choose the direct course of providing that federal law, statutory or decisional, should control the substantive features of labor contracts in the airlines industry. Nothing in Section 184 indicates

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[5] Section 301 of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C.A. § 185(a) provides:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

any intention to affect the substance of collective bargaining agreements.[6] Section 184 of the Railway Labor Act relates solely to the procedure for settling disputes over the interpretation or application of the agreements. National policy, as expressed in the statute, requires that airlines and unions set up a procedure for settling grievances; [fol. 62] federal law governs certain questions integral to this settlement process,[7] but the statutory purpose does not require that the underlying contract rights and duties be brought under federal law, and no inference to that effect can be drawn from any language in the statute. There is therefore no statutory necessity for fashioning an imposing edifice of substantive federal law as the jurisdictional basis for the rights asserted in this suit. *Terminal Railroad Ass'n of St. Louis* v. *Brotherhood of Railroad Trainmen*, 1943, 318

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[6] Duplisea v. Maine Central Railroad, 1 Cir., 1960, 260 F. 2d 495, 496, was a suit against a railroad for wrongful discharge. In holding that there was no federal question jurisdiction, the Court said: "No doubt the Railway Labor Act is an 'Act of Congress regulating commerce' within the meaning of 28 U.S.C.A. § 1337. It would have been within the power of Congress to provide a federal cause of action for damages based upon a wrongful discharge of a railway employee in violation of the collective bargaining agreement. Cf. Textile Workers Union of America v. Lincoln Mills of Alabama, 1957, 353 U. S. 448, 77 S. Ct. 912, 1 L. Ed. 2d 972. If such a federal cause of action had been created, presumably the federal district court would have had jurisdiction, either under 28 U.S.C.A. § 1337, or under the more general provision of 28 U.S.C.A. § 1331, since more than $3,000 was involved. ¶ "But counsel for appellant was unable to point to any provision of the Railway Labor Act creating such federal cause of action. Nor have we been able to find any such provision. . . ." See also text to footnote 23.

[7] In Sigfred v. Pan American World Airways, 5 Cir., 1956, 230 F. 2d 13, 16-17, cert. denied, 351 U. S. 925, 76 S. Ct. 782, 100 L. Ed. 1455, this Court held that federal law governs the scope of judicial review of an award made by a system board of adjustment under § 184 of the Railway Labor Act, since the application of state law to this question would allow a freedom of review incompatible with the purpose of the statute to allow the parties to arbitrate their disputes with finality. In Sigfred, however, there was diversity of citizenship and enforceability of an award was not at issue.

U. S. 1, 63 S. Ct. 420, 87 L. Ed. 571;[8] *Hettenbaugh* v. *Airline Pilots Ass'n International*, 5 Cir., 1951, 189 F. 2d 319.[9]

[fol. 63] II.

The appellants, more narrowly than in the contention just discussed, argue that Section 184 providing for airline system boards of adjustment creates a federal right in the *enforcement of the award.*

On this point we consider our decision in *National Airlines* v. *Metcalf*, 5 Cir., 1959, 271 F. 2d 817 controlling. In Metcalf this Court faced substantially the same question at issue here, although, as the question was presented, the Court found it necessary to focus on the applicability of Section 153 (p)[10] to an award of a system board rather

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[8] In that case, 318 U. S. 1, Mr. Justice Jackson, organ of the court, stated:

"The Railway Labor Act . . . . does not undertake governmental regulation of wages, hours, or working conditions. Instead it seeks to provide a means by which agreement may be reached with respect to them. The national interest expressed by those Acts is not primarily in the working conditions as such. So far as the Act itself is concerned these conditions may be as bad as the employees will tolerate or be made as good as they can bargain for. The Act does not fix and does not authorize anyone to fix generally applicable standards for working conditions. The federal interest that is fostered is to see that disagreement about conditions does not reach the point of interfering with interstate commerce."

[9] In Hettenbaugh, 189 F. 2d 319, 320, this Court held:

"Likewise, the complaint does not state a federal question. To pose a federal question, there must be an allegation of a violation of some right granted by a federal statute or by the federal constitution. No violation of any such right is alleged. The most the complaint does in this case is to allege that the National Airlines was subject to the terms of the Railway Labor Act, and that the appellee had deliberately violated the obligation imposed on it by the act for the purpose of defeating the lawful objective sought to be obtained by said Act."

[10] 45 U.S.C.A. § 153 establishes the National Railroad Adjustment Board and provides a series of rules to govern its operation. Subsection (p) provides:

than on the federal question issue. This Court squarely held that in non-diversity cases an airline system board award is not enforceable in the federal courts under Section 184. In Metcalf, as in the instant case, an aggrieved employee sued to enforce an award of a system board established under Section 184 of the Railway Labor Act. The plaintiff contended that Section 153(p), establishing federal jurisdiction to enforce an award granted by the National Railway Labor Adjustment Board, applied to awards of an airline system board. This Court distinguished between awards of the National Railway Labor Adjustment Board and lower-status awards of an airline system board: the awards of an airline system board, unlike those of the Na- [fol. 64] tional Railway Adjustment Board, carry "no legislative determination as to their finality or as to their being a basis of federal suit jurisdiction".[11] Judge Tuttle, speaking for the Court, held: "[T]he legislative digest of Congress is clearly expressed. Such design is to grant to those winning arbitration awards the right to sue on them in federal courts only when and if the Mediation Board creates a

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"If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States . . . a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board. . . ."

[11] In Metcalf, 271 F. 2d 817, 819, the Court stated:

"Congress made even more clear that it was not elevating to the same rank the status of an award by such *system* board in the airline industry as was granted to an award of the National Railway Labor Adjustment Board by then providing in Section 185 for the future creation of a similar National Board for the air industry when in the judgment of the National Mediation Board 'it shall be necessary to have a permanent national board of adjustment.' . . . All the provisions of the Railway Labor Act are adopted for the air industry except section 153; instead of giving similar relief to [§] 153, special provision is made for adjustment of labor disputes by system or regional boards with no legislative determination as to their finality or as to their being the basis of federal suit jurisdiction."

National Air Transport Adjustment Board whose award is ignored or not complied with by the carrier. Then only does Section 153(p) become operative in the air industry." 271 F. 2d 817, 820.

At appellants strongly urged request to take a fresh look at the jurisdictional issue notwithstanding Metcalf, we have examined the statute in its entirety.

As previously stated, the Act is bare of any provision for federal court enforcement of system board awards; and we have not found, nor have appellants pointed out, any provision carrying the implication that such enforcement was intended. See *Duplisea* v. *Maine Central Railroad*, 1 Cir., 1960, 260 F. 2d 495. The Union contends that Congress must have envisaged federal jurisdiction of system board [fol. 65] awards, since the provision for an adjustment proceeding is ineffectual if its results are not enforceable in the federal courts; Congress would not have established a system of half-way measures.[12] This argument loses its force when the statutory purpose is considered with reference to prevailing state law at the time of enactment. In 1936 courts in nearly all states treated a suit to enforce an agreement to arbitrate differently from a suit to enforce an arbitration award. Under common law an agreement to submit disputes to arbitration was revocable until an award was rendered, and would not prevent a suit on the contract.[13]

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[12] State courts would be required to recognize the validity of arbitration agreements established under the federal law. In Metcalf, 271 F. 2d 817, 820, this Court said:

> "The argument made by Appellant that the statute must be construed so as to give the District Court jurisdiction because otherwise he is without a remedy to enforce a federally enacted right is, of course, without foundation. The state courts have full and complete jurisdiction to grant relief on such an alleged contractual right. There is nothing unusual in the holding that the state courts apply the federal law just as do the federal courts if the cause is one as to which the federal law controls."

For a discussion of a state's constitutional obligation to enforce federally created rights see Comment, 73 Harv. L. Rev. 1551 (1960).

[13] See generally Sturges, Commercial Arbitration and Awards §§ 15, 18, 76-83 (1930); Wolaver, The Historical Background of Commercial Arbitration, 83 U. Pa. L. Rev. 132, 138-44 (1934).

Lakube v. *Cohen*, 304 Mass. 156, 23 N. E. 2d 144 (1939). Statutes enacted to make arbitration agreements enforceable generally were limited to agreements concerning existing disputes. Only the statutes patterned on the New York Draft Act extended enforceability to future-disputes agreements,[14] and some of these excluded arbitration agree- [fol. 66] ments in employment contracts. As late as 1950 a study revealed that,

> "there is a total of ten states in which future-disputes clauses appearing in collective bargaining agreements will be enforced. [Cal., Col., Conn., Del., La., Mass., N. J., N. Y., Pa., Wash.]. In the remainder of the states, and in the federal courts (with some minor variances) future-disputes clauses may be disregarded with impunity." Gregory and Orlikoff, The Enforcement of Labor Arbitration Agreements, 17 U. Chi. L. Rev. 233, 241-42 (1950).

Statutes validating future-disputes clauses did not cover the full range of labor disputes: generally they were limited to disputes which could be the subject of an action at law or equity in a civil proceeding. Gregory and Orlikoff, *supra* at 242. On the other hand, the judicial approach in state courts *after* arbitration has already taken place has almost invariably shown a healthy respect for enforcement of an award. Even at common law an award was valid and binding on the parties. Enforcement could be obtained by an action at law upon the award itself. *Fuerst* v. *Eichberger*, 224 Ala. 31, 138 So. 409 (1931). The award winner could sue in equity for specific performance. *United Fuel Gas Co.* v. *Columbian Fuel Corporation*, 4 Cir., 1948, 165 F. 2d 746. Or the award could be pleaded to bar action on

[14] "The New York Arbitration Law (1920) was the first American statute to expressly embrace agreements to arbitrate future disputes. . . . The Draft Act, advocated by the American Arbitration Association, which is the basis of arbitration statutes in twelve states and of the United States Arbitration Act, 43 Stat. 883-886 (1925), 9 U.S.C.A. §§ 1-15 (1934), is patterned after the New York Arbitration Law." 26 Va. L. Rev. 327. See generally Simpson, Specific Performance of Arbitration Contracts, 83 U. Pa. L. Rev. 161 (1934).

the original claim by the award loser. *Rhodes* v. *Folmar*, 208 Ala. 595, 94 So. 745 (1922). Numerous state statutes [fol. 67] were designed to facilitate enforcement of awards. "In many jurisdictions the award, when filed in court, could automatically be made the basis of a judgment; in others, of a motion to confirm, after which judgment would be entered." Phillips, Rules of Law or Laissez-Faire in Commercial Arbitration, 47 Harv. L. Rev. 590, 592 (1934). See Sturges, Commercial Arbitration and Awards, §§ 308-59 (1930). These statutes varied greatly in their coverage and their procedural requirements and courts in different states varied greatly in the extent of the review which they gave to arbitration awards, but, broadly speaking, state courts could be relied on to give effect to an arbitration award, in contrast with their unwillingness to enforce executory submission agreements. In the light of this historical context it cannot be said that a federal law imposing a requirement of compulsory arbitration but not providing for federal court enforcement of the arbitration award is a halfway measure.

The purpose of the Railway Labor Act is to provide prompt and orderly settlement of labor controversies in order to avoid disruption of the national transportation system by requiring arbitration of disputes.[15] Agreements to arbitrate in the airline industry were all voluntary before the 1936 Act, and the lack of enforceability undoubtedly reduced the incentive to contract for arbitration. Thus, even without any federal enforcement in non-diversity [fol. 68] cases, the statute accomplished a major national objective in requiring an arbitration agreement in every airline employment contract. Construing the Act as not in itself furnishing an independent basis of jurisdiction for enforcement of awards does not mean that there would be

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[15] 45 U.S.C.A. § 151 (a) outlines the general purposes of the Railway Labor Act as follows:

> "The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein . . . (5) to provide prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions."

no compliance with the arbitration agreements. There would often be voluntary compliance, of course, and there would be legal enforcement of the agreements in actions brought in state courts and in diversity actions in federal courts.

There are various reasons why Congress might have preferred to limit federal regulation to the requirement of arbitration rather than include enforcement of the award. Congress might have considered it more appropriate to leave this function to the state courts, because the contract questions involved would be governed by state law. Congress might not have wished to impose additional burdens on the federal district courts. In the ten years following the enactment of the Railway Labor Act in 1926 the states had become more receptive to arbitration; it is a fair inference that Congress might have concluded that federal enforcement of the arbitration awards was unnecessary. Whatever the motivation, the 1936 amendment extending the Railway Labor Act to the airline industry does not go as far in establishing federal control over the settlement process as the original Act, under which the adjustment proceeding itself is conducted by government officials with a national board of adjustment. This difference in congressional treatment of the railroad industry as against the airline industry, and between these industries and other industries, cannot be ignored.

We are not asked to decide whether Congress provided [fol. 69] substantive rights enforceable by a court of competent jurisdiction. The question is simply whether federal district courts are to enforce airline arbitration awards in non-diversity actions. Such enforcement is not necessary to accomplish the purpose of the statute. Federal district courts are courts of limited jurisdiction.[16] On the tenuous basis suggested here, we do not feel free to hold that the Act impliedly provides federal enforcement of an airline system board award as an independent basis for district court jurisdiction.

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[16] Chicot County Drainage District v. Baxter State Bank, 1940, 308 U. S. 371, 60 S. Ct. 317, 84 L. Ed. 329; Gillis v. California, 1934, 293 U. S. 62, 55 S. Ct. 4, 79 L. Ed. 199; Neirbo Company v. Bethlehem Shipbuilding Corporation, 1939, 308 U. S. 165, 60 S. Ct. 153, 84 L. Ed. 167.

III.

The decisions dealing with federal question jurisdiction cannot easily be harmonized.[17] There is general agreement, however, on one principle: an action does not arise under federal law, for purposes of Sections 1331 and 1337 of the Judicial Code, unless the complaint, without benefit of the answer, discloses affirmatively a federally-created cause [fol. 70] of action.[18] A mere reference to a federal act and an assertion that Section 1331 applies are not sufficient to show that the case arises under federal law.[19] This is not a matter of the sufficiency of pleadings under Rule 8, FRCP, but a matter of the plaintiff being able to demonstrate at the start of litigation that he is entitled to have a federal

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[17] In general, see Willard, When Does a Case "Arise" under Federal Laws? 45 Am. L. Rev. 373 (1911); Chadbourn and Levin, Original Jurisdiction of Federal Questions, 90 U. Pa. L. Rev. 639 (1942); Forrester, The Nature of a Federal Question, 17 Tulane L. Rev. 363 (1942); Federal Question Jurisdiction and Section 5, 18 id. 263, (1943); Bergman, Reappraisal of Federal Question Jurisdiction, 46 Mich. L. Rev. 17 (1946); Fraser, Some Problems in Federal Question Jurisdiction, 49 Mich. L. Rev. 73 (1950); Mishkin, The Federal "Question" in the District Courts, 53 Colum. L. Rev. 157 (1953); London, "Federal Question" Jurisdiction, — A Snare and a Delusion, 57 Mich. L. Rev. 834 (1959); Hart and Wechsler, Federal Courts and the Federal System (1953), esp. 763-769. See also notes, Necessity that Federal Question Appear in the Complaint, 8 Wash. & Lee L. Rev. 89 (1951); 3 Vand. L. Rev. 320 (1950).

[18] Metcalf v. Watertown, 1888, 128 U. S. 586, 9 S. Ct. 173, 32 L. Ed. 543; Tennessee v. Union Planters Bank, 1894, 152 U. S. 454, 14 S. Ct. 654, 38 L. Ed. 511; Louisville & Nashville R. Co. v. Mottley, 1908, 211 U. S. 149, 29 S. Ct. 42, 53 L. Ed. 126. In each of these cases the court's decision turned on whether the plaintiff's right was created by state law or by federal law, even though the outcome would depend on the determination of a federal question. See London, Federal Question Jurisdiction 57 Mich. L. Rev. 835, 848 (1959).

[19] Doby v. Brown, 4 Cir., 1956, 232 F. 2d 504, cert. den. 352 U. S. 837, 77 S. Ct. 57, 1 L. Ed. 2d 55; Beistline v. City of San Diego, 9 Cir., 1958, 256 F. 2d 421, cert. den. 358 U. S. 865, 79 S. Ct. 96, 3 L. Ed. 2d 98. See also Gully v. First National Bank in Meridian, 299 U. S. 109, 57 S. Ct. 96, 81 L. Ed. 70.

court hear his case."[20] Here the complaint fails to show an "arising under" claim. Amended pleading could not cure the defect.

The right asserted by the plaintiffs is a creature of contract, not a creature of a federal law. A reading of the complaint shows a claim originating in contract and based on violation of a contract. The system board of adjustment was established by private contract. The grievances pre- [fol. 71] sented alleged violations of contract, not violations of the Railway Labor Act. The grievants followed the grievance procedure stipulated in the contract. The board, established by contract to settle grievances, purportedly acted under authority as defined in the contract. The board rendered an award for violation of the contract, not for violation of the Railway Labor Act. This award rests on the board's interpretation of the contract. When it came to filing suit, the individual plaintiffs did not sue for wrongful discharge under the Act but for enforcement of the arbitration award. Properly enough, they did not allege in their complaint that the award was within the Board's jurisdiction or that the defendant denied the authority and jurisdiction of the board to make the award; assertion of the board's jurisdiction to make the award is not an essential part of such claim. To make out a cause of action, *sustainable by a court of competent jurisdiction*, it was necessary for the plaintiffs to show only the contract (here attached to the complaint), the alleged violation of the contract, the submission of the dispute to the board in accordance with the contract, and the award in their favor. The

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[20] Chief Justice Marshall's dictum in Osborn v. United States, 1824, 9 Wheat, 738, 823, 6 L. Ed. 204, still stands: "The right of the plaintiff to sue cannot depend on the defense which the defendant may choose to set up. His right to sue is anterior to that defense, and must depend on the state of things when the action is brought." "Since the federal courts are courts of limited jurisdiction it is natural that their jurisdiction be made to appear at the time it is invoked. This means that in the case of an action commenced in the federal court and hence invoking its original jurisdiction the natural and logical principle requires the federal question to appear in the complaint, well pleaded, and without anticipation of defenses." Moore's Commentary on the Judicial Code, ¶ 0.03 (22), p. 143 (1949).

"obligation of the contract being a creation of the state" and the "suit being built upon a contract", there "is no necessary connection between the enforcement of such a contract according to its terms and the existence of a controversy arising under federal law".[21]

A federal question can come into this case only by way of the plaintiffs' assuming that the defendant, as a defensive matter, will attack the authority and jurisdiction of the board; that such defense will require a construction [fol. 72] of the Railway Labor Act, especially since the contract defines the board's jurisdiction in language that parallels Section 153 (i) of the Act.[22] It is established beyond dispute, however, that where a federal question comes into a case only as a part of the defense, federal jurisdiction does not exist under Section 1331 and 1337. In a leading decision denying jurisdiction in a similar situation the Supreme Court summarized the principle as follows:

> "Ever since Metcalf v. City of Watertown, 128 U. S. 586, 589, it has been settled doctrine that where a suit is brought in the federal courts 'upon the sole ground that the determination of the suit depends upon some question of a federal nature, it must appear at the outset, from the declaration or the bill of the party suing, that the suit is of that character.' But 'a suggestion of one party that the other will or may set up a claim under the Constitution or laws of the United States does not make the suit one arising under the Constitution or those laws.' State of Tennessee v.

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[21] Gully v. First National Bank in Meridian, 1936, 299 U. S. 109, 57 S. Ct. 96, 81 L. Ed. 70.

[22] The collective bargaining agreement provides:

> "(e) The Board shall have jurisdiction over disputes between any employee covered by the Mechanics' Agreement and the Company, growing out of grievances or out of interpretation or application of any of the terms of the Mechanics' Agreement. The jurisdiction of the Board shall not extend to proposed changes in hours of employment, rates of compensation, or working conditions covered by existing agreements between the parties hereto."

For language of Section 153 (i), see footnote 2.

Union & Planters' Bank, 152 U. S. 454, 464. The plaintiff's claim itself must present a federal question 'unaided by anything alleged in anticipation or avoidance of defenses which it is thought the defendant may interpose.' Skelley Oil v. Phillips Petroleum Co., 1950, [fol. 73] 339 U. S. 667, 672, 70 S. Ct. 876, 879, 94 L. Ed. 1194, 1200.

Since it is not part of the plaintiff's case to establish that the board acted within its jurisdiction, the instant case falls squarely within this rule.

IV.

It is not enough that in the background a federal law compelled the parties to enter into the contract. "A suit", said Mr. Justice Holmes, "arises under the law that creates the cause of action"; the fact that justification for an alleged wrong may depend upon the federal patent law is no more material to the question under what law the suit is brought than it would be in an action of contract." *American Well Works* v. *Layne & Bowler Co.*, 1916, 241 U. S. 257, 36 S. Ct. 585, 60 L. Ed. 987. If a cause of action is state-created, federal jurisdiction cannot be predicated on the fact that the outcome of the case may turn on an incidental federal question. It is the suit, "not a question in the suit, that must arise under the laws of the United States." Mr. Justice Holmes, dissenting in *Smith* v. *Kansas*, 1921, 255 U. S. 180, 41 S. Ct. 243, 65 L. Ed. 577. The Supreme Court adopted the Holmes test in two later leading cases.[23]

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[23] McGoon v. Northern Pacific Railway Co., D.C.N.D., 1913, 204 F. 2d 998, a case often cited, states the rule: "[T]he following is a correct affirmative rule: Whenever federal law grants a right of property or of action, and a suit is brought to enforce that right, such a suit arises under the law creating the right, within the meaning of statutes defining the jurisdiction of federal courts. . . . What, then, do the courts mean when they say that the construction of federal law must be involved in order to confer this jurisdiction? Certainly not that the case will necessarily turn upon an interpretation of the statute, but simply that the complaint must set forth a cause of action of which federal law is an essential ingredient, and which may, therefore properly involve a construction of that law."

[fol. 74] In *Puerto Rico* v. *Russell & Company*, 1933, 288 U. S. 476, 483, 53 S. Ct. 447, 449-50, 77 L. Ed. 903, 909, the Court couched the principle in straight Holmesian language. Again, Mr. Justice Cardozo said, in *Gully* v. *First National Bank in Meridian*, 1936, 229 U. S. 109, 111, 57 S. Ct. 96, 81 L. Ed. 70: "Federal jurisdiction may be invoked to vindicate a right or privilege claimed under a federal statute. It may not be invoked where the right asserted is non-federal, merely because the plaintiff's right to sue is derived from federal law, or because the property involved was obtained under federal statute. The federal nature of the right to be established is decisive." If we look far enough "countless claims of right can be discovered to have had their source or their operative limits in the provisions of a federal statute", but it is "the federal nature of the right to be established that is decisive". "To bring a case within [Section 1331], a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action." It might be said that here the Railway Labor Act was an ingredient of the plaintiffs' claim, since the adjustment procedure was a result of the Act, but the Act simply provided the impetus for the contract creating the right of action.

This Court applied these principles in *Amalgamated Association of Street Electric Railway and Motor Company Employees* v. *Southern Bus Lines*, 5 Cir., 1951, 189 F. 2d 219, 221, a non-diversity action by a union to compel an employer to arbitrate proposed changes in a contract of employment. The Union contended that the suit arose under the United States Arbitration Act, just as the appellants here rely on the Railway Labor Act. This Court stated:

> [fol. 75] "Upon the allegations of the complaint, we think it clear that the court below did not have jurisdiction over this controversy. No facts are alleged upon which the conclusion can legitimately be based that the District Court independently of the arbitration agreement would have jurisdiction of the 'subject matter of a suit arising out of the controversy between the parties' as required by Section 4 of the Federal Administration Act, 9 U. S. C. A., par. 4 . . . Viewing

> the case at bar against this background of established principle, we do not find in it the elements of federal jurisdiction. What is here involved is merely a controversy between the parties as to the construction of a contract which allegedly arises out of the laws of the United States respecting collective bargains between employer and employees in interstate commerce; but the right of action asserted does not arise out of those laws but only arises from the subsequent contractual relations of the parties. The wrongful breach of such relations does not confer federal court jurisdiction unless there is diverse citizenship."[24]

Duplisea v. *Maine Central Railroad*, 1 Cir. 1960, 260 F. 2d 495, was an action under the Railway Labor Act against a railroad for alleged wrongful discharge of the [fol. 76] plaintiff.[25] In affirming an order of dismissal for lack of jurisdiction, the Court said:

> "The complaint is conveniently vague as to the basis of federal jurisdiction. . . . Nor is there any allegation of a breach of a duty imposed or the violation of a right given by the Constitution, the Railway Labor Act, or any other federal statute. . . . Nor does the complaint raise any question as to the validity, construction, or effect of the Constitution or of any law of the United States. On the contrary, under the terms of the complaint, plaintiff seeks damages for an alleged wrongful discharge in violation of the terms of a collective bargaining agreement negotiated by the Railroad and the Brotherhood of Railroad Trainmen under the provisions of the Railway Labor Act."

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[24] For other cases holding that the Arbitration Act does not furnish an independent basis for jurisdiction, see Amalgamated Association v. Southern Bus Lines, 5 Cir., 1951, 189 F. 2d 219; Krauss Bros. Lumber Co. v. Louis Bossert & Sons, Inc., 2 Cir., 1933, 62 F. 2d 1004; In re Woerner, 2 Cir., 1929, 31 F. 2d 283; Mengel Co. v. Nashville Paper Products and Specialty Workers Union, 6 Cir., 1955, 221 F. 2d 644.

[25] See footnote 6 for an additional quotation from this opinion.

See also *Hayes* v. *Union Pac. R. Co., et al.*, 9 Cir., 1950, 184 F. 2d 337[26] and *Shipley* v. *Pittsburgh & L. E. R. Co.*, [fol. 77] 1947, D. C. Pa., 70 F. Supp. 870.[27]

Appellants rely on *Peyton* v. *Railway Express Agency*, 1942, 316 U. S. 350, 62 S. Ct. 1171, 86 L. Ed. 1525 and *Crispin Company* v. *Lykes Brothers Steamship Company*, 1955, 134 F. Supp. 704. We consider these cases inapplicable.

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[26] Hayes v. Union Pac. R. Co., et al., 9 Cir., 1950, 184 F. 2d 337, involved the question whether the district court had jurisdiction under the Railway Labor Act of an employee's complaint charging racial discrimination in the performance of a collective bargaining agreement. The Court held that there was no federal question:

> "[I]t is clear to us that the Federal Courts are not charged by federal law with the duty or function of policing the parties in the performance of collective bargaining agreement entered into pursuant to the Railway Labor Act. Congress did not, by the Railway Labor Act, grant jurisdiction to the Federal Courts to afford relief for breaches of performance of collective bargaining agreements. Appropriate tribunals have been established for that purpose. 45 U. S. C. A. § 153; National Railroad Adjustment Board; Slocum v. D. L. & W. R. Co., 339 U. S. 239, 70 S. Ct. 577. It is only when collective bargaining agreements are unlawfully entered into or when the agreements themselves are unlawful in terms or effect, that federal courts may act. This is made quite clear by the Supreme Court in Steele v. L. & N. R. Co., 323 U. S. 192, 65 S. Ct. 226, 89 L. Ed. 173 and Turnstall v. Brotherhood, 323 U. S. 210, 65 S. Ct. 235, 89 L. Ed. 187. . . ."

[27] In Shipley v. Pittsburgh & L. E. R. Co., 1947, D. C. Pa., 70 F. Supp. 870, twenty railroad employees sued to recover extra compensation under a contract authorizing extra pay for performance of special duty. The court, in holding that the Railway Labor Act did not confer "arising under" federal jurisdiction, said:

> "[T]he present suit is based on the provisions of a private contract entered into between the bargaining agent of the plaintiffs and the defendant company. The obligation of the contract is a creation of the state . . . Nothing in the present suit involves the validity, construction or effect of the Railway Labor Act upon which the result of this action depends. Although the parties to this proceeding were governed by the act, the right of action, if one exists, is based on the alleged breach of a contract which it is alleged should be considered a part of the contract; the cause of action does not arise under the Railway Labor Act but only from the consequent contractual relations of the parties."

Peyton was an action under the Carmack Act against a common carrier for items lost or damaged in interstate shipment. Crispin arose under the Carriage of Goods by Sea Act. Both statutes regulate in great detail the substantive obligations of the shipper-carrier relation. As the court said in Crispin: "[T]he only duty which the defendant owes plaintiffs springs from the shipper-carrier relation . . . [W]hether the complaint sounds in tort or in contract, the obligations, responsibilities and liabilities which result from the shipper-carrier relation are circumscribed by the terms of the statute." That is not the case here. The Railway Labor Act leaves to the parties the right to decide their obligations, responsibilities, and liabilities. The only [fol. 78] statutory limitation is the requirement of a provision in the contract for arbitration and even this provides only that the board's jurisdiction shall not exceed the jurisdiction authorized under Section 153. This suit is nothing more than a state-created action to construe a contract.

It may seem ironical that of all the large industries engaged in interstate commerce only in the airline industry are parties to a collective bargaining agreement denied access to federal courts in non-diversity cases for the purpose of enforcing arbitration awards. If any industry should have ready access to federal courts because of the interstate character of its business, it is the airline industry. The answer we must discipline ourselves to give, however, is that federal district court jurisdiction is created only when Congress has provided for it; if the legislative pattern creates an anomaly, it is not for the courts to override the statutory dictates.[28] Here, jurisdiction lies with the state courts of Tarrant County, Texas.

Judgment is

AFFIRMED.

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[28] Irregularity in the legislative pattern is unfortunate, but it is not surprising in view of the fact that laws affecting similar problems in related areas may be enacted at different times and by different legislators. This is a case in point. The Railway Labor Act was enacted in 1926. The amendment of the Railway Labor Act extending most of its provisions to the airlines industry was passed in 1936. And the Labor Management Relations Act, which contains Section 301 relied on in Lincoln Mills, was enacted in 1947.

[fol. 79] Brown, Circuit Judge, Dissenting:

It is a paradox that the strength of the Court's opinion is that the result does not make sense. Of course the Court is not quite that harsh in its characterization of the result, but after spending pages demonstrating why Congress must have looked to the varying attitudes of 48 states for the enforcement of industrial arbitral decisions thought necessary to secure continuity to interstate air commerce, the Court puts it no less plainly in this euphemism: "If any industry should have ready access to federal courts because of the interstate character of its business, it is the airline industry." —F. 2d—, —.

The strength is derived from the inescapable historical fact that Congress also errs, and that if, as a consequence, the legislative machinery thus established is not adequate, the deficiency cannot be supplied by the Judiciary. But we ought to be very certain that the result is both inescapable and may not be bridged over by legitimate statutory interpretation within the traditional competence of the courts.

Of course my disagreement with this opinion carries with it a like difference with our earlier one in *Metcalf* v. *National Airlines, Inc.*, 5 Cir., 1959, 271 F. 2d 817.[29] The thesis of that case, echoed here, is that Congress deliberately chose to have the federal right vindicated in state courts.[30] That highlights this curious result. Under this [fol. 80] case, *Metcalf*, and more directly under *Sigfred*,[31] the law to be applied by the tribunal is federal law. This presupposes that the right is of federal origin—here spe-

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[29] As the briefs in that case reflect, all — the parties and this Court — were preoccupied with the jurisdictional amount of $3,000 under 28 USCA § 1331. No mention was made of § 1337.

[30] See footnote 12, supra. In these words we recognized that it was a federal right subject to federal principles: "There is nothing unusual in the holding that the state courts apply the federal law just as do the federal courts if the cause is one as to which the federal law controls." 271 F. 2d 817, 820.

[31] Sigfred v. Pan American World Airways, 5 Cir., 1956, 230 F. 2d 13, 16-17, cert. denied, 351 U. S. 925, 76 S. Ct. 782, 100 L. Ed. 1455, discussed in note 7, supra.

cifically under 45 USCA §§ 181-188. Yet our present opinion proceeds on the assumption that the *contract* is a creature of state law. I am unable to comprehend how a contract compelled by federal law and to be interpreted by courts under federal law principles may realistically be characterized as a creation of the state, so that a suit to enforce it is not one "arising under" federal law.

Air carriers and their employees are compelled to provide for industrial arbitration through System Boards of Adjustment. That was a recognition that serious disputes involving the most troublesome problems of constitutional law, due process and the like were being committed to tribunals made up of airplane pilots, aircraft engineers, mechanics and similar employees wholly untrained in the law or the business of judging. Moreover, it contemplated decision by boards made up of partisans with a neutral chairman only if needed to prevent an impasse.[32]
[fol. 81] If there is anything clear in this legislative muddle, it is this: Congress in 1936 could not seriously have thought that stability and continuity to interstate air commerce would come from the undulating policies and fre-

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[32] The Court apparently sees some basis for congressional distinction between system, group or regional boards of adjustment under § 184 pending establishment of a National Air Transport Adjustment Board under § 185 and those of § 153 on the ground that the National Railroad Adjustment Board is a governmental tribunal. The Court says: "Whatever the motivation, the 1936 Amendment extending the Railway Labor Act to the airline industry does not go as far in establishing federal control over the settlement process as the original Act, under which the *adjustment proceeding itself is conducted by government officials with a national board of adjustment.* This difference in congressional treatment of the railroad industry as against the airline industry, and between these industries and other industries, cannot be ignored." —— F. 2d ——, ——. (emphasis added)

Of course this is erroneous. The Railroad Adjustment Board and its four Divisions are each made up of partisan appointees of labor and management. Government enters the picture only through the designation of a neutral umpire and the payment of his compensation by the National Mediation Board. See 45 USCA § 153 (g) (n) (k) (1). The National Mediation Board does, of course, bear the burden of compensation paid to certain staff clerks and assistants of the Adjustment Board. 45 USCA § 153 (t).

quently demonstrated hostilities of the legislatures and courts (or both) of 48 states in the enforcement of anything thought so essential to industrial peace as this system of governmentally compelled arbitration. Indeed, §§ 181-188 expressly include by reference §§ 157-159. These actions of the Railway Labor Act provide for arbitration over and beyond action before the Adjustment Board or the Mediation Board. These sections make the decision of the Board of Arbitration reviewable and enforceable solely in the United States District Courts. 45 USCA § 157, § 158 (k) (1), § 159, First, Second.

Whether for an airlines labor controversy the submission to and processing by a § 184 System Board of Adjustment constitutes such a § 157 "arbitration," I need not decide. What is plain is that any such § 157 arbitration is the substantial equivalent of the arbitration award discussed at great length in Part II of the Court's opinion. There the Court develops the thesis that Congress was optimistic that whereas state courts would be hostile to executory contracts *to* arbitrate, they would give cordial, effectual wel- [fol. 82] come to completed arbitration awards.[33] Here § 157 is proof, however, that where the decision partakes of an agreed contractual arbitration which has proceeded through decision, Congress recognized that the proper, and only proper, tribunal for review and enforcement was the federal system.

The result becomes even more incongruous if it is assumed that an arbitration decision of an airways System Board of Adjustment made pursuant to a collective bargaining contract under compulsion of § 184 is not a § 159 arbitration. According to this Court, "jurisdiction" of a suit for the enforcement of a System Board of Adjustment award "lies with state courts of Tarrant County, Texas." —F. 2d —, —. If, as to this very controversy, the parties would have prepared an agreement of arbitration under § 157, it is expressly required that review and enforcement be solely in the local United States District Court. If Congress, with its rather rich experience in the jealous

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[33] See notes 12 through 15 and related text. —— F. 2d ——, ——.

hostility of the Judiciary to lay arbitration[34] was content with state tribunals as the sole effective means of endorsement of the compulsorily required contractual arbitration, it is strange indeed that it prescribed the federal route as to § 157 arbitration.

I do not mean to overemphasize § 157 as a technically precise investment of federal jurisdiction. We are searching for probable congressional intent. In that quest it points the way that Congress surely thought that for interstate air commerce it was essential that one system, and only one [fol. 83] system, should undertake to police and enforce labor relations between air carriers and their employees. It must be remembered that the airline Labor Act was a complete departure from the existing structure. Whereas the National Labor Relations Board had only the power to protect bargaining in good faith, the airline Labor Act brought into play the National Mediation Board (§ 183) for the solution of "major" disputes—those on which the parties had not made a contract.[35]

It is inconceivable to me that with respect to contracts induced by the operation of the National Mediation Board under § 183 and the incorporation of §§ 151-152 and §§ 154-156, Congress at the same time meant for enforcement of arbitration decisions under such contracts to be committed to the unknown, unpredictable and uncontrollable attitudes of 48 states. Not the least of the absurdities is that an airplane flies from state to state. What state is to be the forum?[36] What state was the parent of this crea-

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[34] See United States Arbitration Act, 9 USCA §§ 1-14 (1925).

[35] Elgin, Joliet & Eastern R. Co. v. Burley, 1945, 325 U. S. 711, 722-728, 65 S. Ct. 1282, 89 L. Ed. 1886; Brotherhood of Railroad Trainmen v. New York Central R. Co., 6 Cir., 1957, 246 F. 2d 114, cert. denied, 355 U. S. 877, 78 S. Ct. 140, 2 L. Ed. 2d 107; Norfolk & P.B.L. R. Co. v. Brotherhood of Railroad Trainmen, 4 Cir., 1957, 248 F. 2d 34, cert. denied, 355 U. S. 914, 78 S. Ct. 343, 2 L. Ed. 2d 274.

[36] The selection of the state is only the beginning. What local law of the local state applies? For example, in Texas is it the Arbitration Act, TEX. CIV. STAT. arts. 224-238 (Vernon 1959), or the special one covering labor controversies in arts. 239-249, or the case-made law? See 6 Tex. Jur. 2d Arbitration and Award §§ 54-57 (1959).

ture—the consensual contract containing the agreement to arbitrate? May any or all of the states beneath the route or routes traveled by the airline be resorted to? Is the continuity of essential air traffic to be at the plaintiff's choice of forum? What is to happen when several plaintiffs bring [fol. 84] several suits in several states? Is effective federal control of an operational activity deemed so essential to national welfare to be precariously dependent upon the accident of diversity of citizenship?

Of course this Court does not shirk the obvious answers to these queries. It avoids them as ironical proof either of congressional aberration, of indecision or, more questionable, a conscious choice of turning it all back to 48 states. And under some ascetical discipline demonstrating real judicial restraint because the result is so obviously unsound, it despairs that with the signs all pointing one way, a barricade was somehow left across the road.

Just as *Lincoln Mills* cut through similar logical considerations to effectuate a clearly revealed policy, so here industrial arbitration compelled under §§ 181-188 is so much a part of the legislative machinery to protect the free flow of interstate air commerce that effectual enforcement of an award is realistically the assertion of a claim arising under a law regulating commerce.

I therefore respectfully dissent.

[fol. 85]

IN UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 18286

INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, R. K. DOUD, S. V. CORNSTUBBLE, O. L. BROOM, C. R. CASEY, P. R. DAVIS and E. E. FUQUA,

versus

CENTRAL AIRLINES, INC.

JUDGMENT—October 13, 1961

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, International Association of Machinists, AFL-CIO, R. K. Doud, S. V. Cornstubble, O. L. Broom, C. R. Casey, P. R. Davis and E. E. Fuqua, and the surety on the appeal bond herein, Ray E. Cotnoir, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

Brown, Circuit Judge dissenting.

[fol. 88] Order Staying Mandate—November 14, 1961 (omitted in printing).

[fol. 89] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 90]

SUPREME COURT OF THE UNITED STATES

No. 656, October Term, 1961

INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, et al.,
Petitioners,

vs.

CENTRAL AIRLINES, INC.

ORDER ALLOWING CERTIORARI—February 26, 1962

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Office Supreme Court, U.S.
FILED
JAN 10 1962
JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1961

No. [redacted] 61

INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, R. K. Doud, S. V. Cornstubble, O. L. Broom, C. R. Casey, P. R. Davis and E. E. Fuqua,

Petitioners,

v.

CENTRAL AIRLINES, INC.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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In the

Supreme Court of the United States

OCTOBER TERM, 1961

No. .....

INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, R. K. Doud, S. V. Cornstubble, O. L. Broom, C. R. Casey, P. R. Davis and E. E. Fuqua,

Petitioners,

v.

CENTRAL AIRLINES, INC.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

The International Association of Machinists, AFL-CIO, R. K. Doud, S. V. Cornstubble, O. L. Broom, C. R. Casey, P. R. Davis and E. E. Fuqua respectively pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on October 13, 1961, (Appendix C, *infra*, p. 29a.)

OPINIONS BELOW

The opinion of the court below (Appendix A, *infra*, pp. 1a-22a) and the dissenting opinion of Circuit Judge John

R. Brown (Appendix B, *infra*, pp. 23a-28a) are reported at 295 F. 2d 209, 49 LRRM 2016 and 43 CCH Labor Cases ¶17,210.

JURISDICTION

The judgment of the Court of Appeals was entered on October 13, 1961, (Appendix C, *infra*). The jurisdiction of this Court is invoked under 28 U. S. C. §1254 (1).

QUESTION PRESENTED

Whether a suit to enforce an award of an airline system board of adjustment, created by requirement of the Railway Labor Act, presents a federal question that confers jurisdiction on a United States District Court.

STATUTES INVOLVED

The statutes involved and referred to herein are the Railway Labor Act (44 Stat. L. 577, as amended; 45 U. S. C. §§151-163, 181-188), the Labor Management Relations Act of 1947, as amended (61 Stat. 136, 29 U. S. C. §141-144, 171-188), and the jurisdictional statutes 28 U. S. C. §1331 (a) (62 Stat. 930, amended 72 Stat. 415) and §1337 (62 Stat. 931). The pertinent provisions of these statutes are set out verbatim in Appendix D. *infra*, p. 30a et seq.

STATEMENT

The facts of the case are accurately described in the opinion of the court below (*infra*, pp 1a-4a). Stated briefly, six employees, the named petitioners herein, were discharged by

the respondent for their failure to submit to a hearing at which they were denied union representation (Tr. 32-33). Their grievances were submitted in due course to arbitration before a system board of adjustment, under a contract clause required by the Railway Labor Act (§184). The board rendered an award in favor of the grievants and ordered reinstatement of the employees (Tr. 14-33). Respondent refused to comply with the award, alleging that it was "in excess of the jurisdiction and authority of the board." (Tr. 38-39). Thereafter, the union and the grievants brought suit in federal district court to enforce the award, based on the existence of a federal question. The trial court, however, dismissed for lack of jurisdiction.

The case was appealed to the United States Court of Appeals for the Fifth Circuit on March 22, 1960. On October 13, 1961, the Court of Appeals rendered its judgment in a split decision. Its two opinions are set out *infra* as appendices A and B.

REASONS FOR GRANTING THE WRIT

The well reasoned dissenting opinion of Judge Brown, *infra*, pp. 23a-28a, is in itself a complete statement of why writ of certiorari should be granted. He aptly summarizes the majority opinion in the first sentence:

> "It is a paradox that the strength of the Court's opinion is that the result does not make sense."

Indeed, it does not, for the court below has paradoxically recognized, in three separate cases, that the law governing the review of airline system boards of adjustment is federal

law—that such boards enforce federal rights subject to federal principles.

The court first passed on the question in *Sigfred v. Pan American Airways, 230 F. 2d 13, 16-17,* as follows:

> *"The question in this case is whether Florida law or federal law governs the reviewability of an award made by such a board in interpreting a collective bargaining agreement negotiated under the duty to bargain imposed on air carriers and their employees by the Act.* Florida law makes unenforceable any agreement to arbitrate future disputes and thus would strike down the provision in the agreement that awards of the Pilots System Board of Adjustment shall be final and binding. Appellant urges that it likewise allows the review of any pure question of law. However tenuous the distinction between so-called 'unmixed' questions of law and those requiring the deciding of a factual issue also, the appellant contends that we have such a pure question of law before us here in the problem of interpreting the collective bargaining agreement.
>
> "Without passing on the issue of whether such a rule exists in Florida, it becomes plain upon a moment's reflection that such a system of review would completely sweep aside Congress's efforts to provide for a prompt and orderly settlement of labor disputes by system boards of adjustment. Moreover, such a result would obtain solely as a matter of compliance with Florida's contrary policy of allowing disputants a court review of their disputes, regardlless of their agreements to arbitrate those questions with finality. *It would rest the effectiveness of the statutory plan upon the variegated characteristics of state law, and eventually lead to the anomaly of a National Air Transport Adjustment Board whose decisions, except in awarding money, must be final, existing alongside coordinate system boards in Florida whose decisions cannot be final.* Although the

parties could achieve what they have here sought, a final decision by a board versed in the problems of the industry, by electing to come under the national board, they would lose thereby whatever advantages there are in operating under a board established by a single carrier and its employees.

"We see no reason to force such an election. Congress having required the negotiation of collective bargaining agreements, and the establishment of boards of adjustment to interpret them, we deem it a reasonable corollary thereto that it intended that the scope of review in appeals from these boards should be determined by federal courts, applying federal law." (Emphasis added.)

The foregoing analysis appears sound, and is consistent with an expressed policy of uniformity which Congress had written into the Act. However, the same court backed away from this reasoning in the next case that raised the question, *National Airlines v. Metcalf, 271 F. 2d 817.* In *Metcalf* the court pointed out that the phrase "federal courts, applying federal law," which it had used in *Sigfred*, only meant federal courts in *diversity cases* applying federal law, however the court reiterated that although the state court would have jurisdiction in non-diversity cases, it was "a federally enacted right" and a "cause as to which federal law controls." *271 F. 2d 817, 820.*[1]

The third case before the court was *Central Airlines*, the instant case, but here again the court adhered—somewhat—to its *Sigfred* and *Metcalf* holding: that regardless of which

[1]The jurisdictional issue in the *Metcalf* case rested on narrow grounds, for the agreed question was whether Section 3 (p), which by express terms of the Act was applicable to Railroads but not to airlines, permitted resort to the federal Courts for enforcement of an airline system board award. The court could have been right in refusing jurisdiction in *Metcalf*, but clearly wrong in the instant case where jurisdiction is based on 28 U.S.C. §1331 and §1337.

court applied the law, it would be *federal law* that would be applied. At least the court correctly paraphrased the *Sigfred* holding in footnote seven (p. 6a. *infra*) to the effect that

> "federal law governs the scope of judicial review of an award made by a system board of adjustment under §184 of the Railway Labor Act, since the *application of state law to this question would allow a freedom of review incompatible with the purpose of the statute to allow the parties to arbitrate their dispute with finality.*" (Emphasis added.)

Obviously, the court was not overruling its *Sigfred* holding. Likewise, in footnote 12 (p. 9a, *infra*) the majority reaffirmed the *Metcalf* holding that "federal law controls," noting only that "State Courts would be required to recognize the validity of arbitration agreements *established under federal law.*" (Emphasis added.)

But, although the court recognized *below the line* that federal law applied to review of §184 system board awards, its opinion *above the line* indicates only a vague awareness of that fact. The majority wrote (pp. 6a-7a, *infra*):

> "Nothing in Section 184 indicates any intention to affect the substance of collective bargaining agreements * * * federal law governs certain questions integral to this settlement process, but the statutory purpose does not require that the underlying contract rights and duties be brought under federal law, and no inference to that effect can be drawn from any language in the statute."

Then, as if written by a different court not bound by its own precedent, the court noted that Congress might have considered it more appropriate to leave the function of en-

forcement of the award to state courts "because the contract questions involved would be governed by state law." (p. 12a, *infra*.)

Petitioners are frankly unable to reconcile these conflicting statements in the majority opinion. Petitioners agree with the dissent that "the law to be applied by the tribunal is federal law" and "This presupposes that the right is of federal origin * * *." (*infra*, p. 24a.) Aside from the fact that the majority also reached this conclusion, but somehow failed to stay with it, the statute itself makes consistent sense only when given such a construction.

Another perplexing question raised by the majority's analysis is the way in which it distinguished *Textile Workers Union v. Lincoln Mills, 353 U. S. 448, 77 S. Ct. 912, 1 L. Ed. 2d 972*, by pointing out that "Section 301 of the Labor Management Relations Act provides specifically for federal district court jurisdiction over suits involving collective bargaining agreements * * *" and that "In itself it was the statutory source for the Congressional direction that federal courts 'fashion a body of federal law for the enforcement of these collective bargaining agreements.' " (*infra*, p. 5a.)

Such analysis overlooks the fact that this very difference between the two statutes makes the judicial task easier, because, as the court below pointed out in footnotes 7 and also in *Sigfred*, "federal law governs the scope of judicial review of an award made by a system board of adjustment under §184 of the Railway Labor Act * * *." Thus, federal law—call it federal common law, call it federal substantive law or

call it simply law derived from the federal Railway Labor Act—already applies to determining the scope of the enforceability of these airline system board awards, thus the Supreme Court need not call for the fashioning of a new body of federal law. The federal law is there, it need only be applied. And federal courts certainly may enforce federal law, such law being derived from a federal statute.

The statute itself provides ample support for this interpretation. In addition to the very relevant comparisons drawn by the dissent between arbitration under Section 184 and arbitration under Sections 157-159 (pp. 25a-27a), which we hereby incorporate by reference, other provisions of the statute provide direct support for the application of federal statutory law to the enforcement of §184 system board arbitration.

Unlike the Labor Management Relation Act, there is an express provision in the Railway Labor Act requiring carrier employers "*to maintain agreements*", and "to settle all disputes, *whether arising out of the application of such agreements* or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof." (Section 2, First, emphasis added, p. 30a, *infra.*) This is a clear statutory mandate that collective bargaining agreements be maintained and that disputes thereunder be settled —and failure to do either violates the statute. A breach of the collective bargaining contract, or a failure to settle a dispute thereunder, creates a federally enforceable statutory

right by the aggrieved union to obtain judicial redress. This provision is unique in the Railway Labor Act.

Although the Labor Management Relations Act created a statutory duty to bargain for contracts, the maintenance of such contracts and the settlement of disputes thereunder are not given the same mandatory status as under Section 2, First of the Railway Labor Act. The critical national importance of all carriers in interstate commerce subject to the Railway Labor Act is the obvious reason for the difference. The Wagner and Taft-Hartley Acts emphasized the freedom of collective bargaining, but in the Railway Labor Act, Congress did not rely upon collective bargaining alone, but also created by statute elaborate means of settling disputes—both major and minor—specifically designed to avoid work stoppage.

Section 184 of the Act is the machinery which Congress provided for enforcement of such rights as to airline collective bargaining contracts. And, since the Railway Labor Act was especially designed to prevent work stoppages, Section 184 provided for compulsory arbitration. The parties were not left to free collective bargaining to agree or not agree upon arbitration as a final means of settling disputes.

Enforcement of arbitration under Section 184 was therefore obviously not left to the haphazard vagaries of state law, especially since most states would not grant specific enforcement of agreements to arbitrate future disputes. The na-

tional labor policy depends upon "minor disputes" under the Railway Labor Act (controversies over the meaning of an existing collective bargaining contract) being settled by adjustment board procedures; and it is now recognized that strikes over "minor disputes" which have been submitted to adjustment boards may be enjoined notwithstanding the provisions of the Norris-La Guardia Act. *Brotherhood of Railroad Trainmen v. Chicago River & Indiana Ry. Co., 353 U. S. 30.* The doctrine of the *Chicago River* case has been extended to airline disputes by the lower federal courts. *Northwest Airlines, Inc. v. I. A. M., 178 F. Supp. 825 (38 CCH Labor cases ¶66,056); Northwest Airlines v. I. A. M., D. C. Minn., 1961, Civil Action No. 4-61 Civ. 17; American Airlines v. Flight Engineers, D. C. No. Dist. Texas, 1961, No. 8679 Civil.* These courts have not recognized any distinction between the jurisdiction of an airline system board and that of a Railway National Board of Adjustment to settle minor disputes. In both instances, strikes have been enjoined when minor disputes have been involved.

If airline system board awards are not enforceable in federal court—and likewise suits to require submission to a system board would not be enforceable—then a serious question is raised as to whether the doctrine of the *Chicago River* case can be applicable to airlines, for the doctrine is premised on a Congressional intent in the Railway Labor Act to provide for compulsory arbitration of minor disputes. The *Chicago*

River case refers to the National Board of Adjustment, and that "Awards of this Board are 'final and binding upon both parties'."

These are among the reasons why certiorari should be granted herein. The airline industry, perhaps more than any other industry, is totally interstate in its operation, and yet the decision of the court below means that the settlement of most labor disputes in this industry will have to depend upon the separate jurisdiction of fifty states court systems, with fifty different legal standards as to the enforceability of arbitration. Which state obtains jurisdiction will likely depend on which party first files suit, either to enforce or to set aside the award,[2] for every airline, with its multi-state routes, offers a wide choice of available state forums, each of which could claim a basis for jurisdiction. The conflict of law questions which would arise are frightening to contemplate.

The question is of grave concern to the entire nation. A recent strike of flight engineers on a half dozen airlines brought air travel to a halt throughout much of the country, and was finally settled only when the federal government intervened.

Strikes over minor disputes may be equally as serious. If federal district judges have authority to enjoin such strikes because of the existence of a system board of adjustment

[2]In the instant case Central Airline filed its suit in state court to set aside the award within hours after the award was rendered, and before the union knew for sure that the company would not comply with the award.

which *may* have jurisdiction, then surely such courts must also be able to examine into that jurisdiction to determine the validity and the finality of system board awards.

Petitioners herein sought to enforce an award which was rendered under a clause which Congress required the parties to execute. Respondent refused to comply with the award claiming the Board lacked jurisdiction. Whether the award was valid requires a statutory determination of the phrase "jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 3, title I of this Act." (p. 38a, *infra.*) The pertinent provisions of Section 3, title I are reproduced *infra*, pp. 31a-34a. Patently, enforcement of the award requires interpretation of a statute and is an action which arises under the laws of the United States, and specifically under the laws regulating commerce. Especially is this so because of the statutory requirement of maintaining contracts and settling disputes thereunder (Section 2, First).

CONCLUSION

We respectfully conclude by borrowing the closing paragraph of Judge Brown's dissent:

> "Just as Lincoln Mills cut through similar logical considerations to effectuate a clearly revealed policy, so here industrial arbitration compelled under §§ 181-188 is so much a part of the legislative machinery to protect

the free flow of interstate air commerce that effectual enforcement of an award is realistically the assertion of a claim arising under a law regulating commerce."

Respectfully submitted,

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January 9, 1962

APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18286

Appeal from the United States District Court for the Northern District of Texas

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(October 13, 1961)

Before RIVES, BROWN, and WISDOM, Circuit Judges.

WISDOM, Circuit Judge: The sole issue here is whether a federal court has jurisdiction of this suit as one arising under the laws of the United States.

The International Association of Machinists, AFL-CIO, the certified bargaining representative of Central Airlines' mechanics and stock and stores employees, joined by six aggrieved employees, sued Central Airlines, Inc. in the United States Court for the Northern District of Texas. The plaintiffs ask for enforcement of an award rendered by a system board of adjustment (arbitration). There is no diversity of citizenship. As to jurisdiction, the complaint alleges only that the court has jurisdiction of this action under 28 U. S. Code

Section 1331,[1] "this being a matter . . . [that] arises under the laws of the United States, specifically under the Railway Labor Act." The district court dismissed the suit for lack of jurisdiction. We affirm.

Central Airlines and the Union entered into a System Board Agreement in accordance with Section 184 of the Railway Labor Act[2] imposing a duty on every air carrier and its employees, acting through their representatives, to

[1]The federal question problem is the same under § 1337 as under § 1331, except that § 1331 is somewhat more general and the amount in controversy must exceed $3000 (now $10,000). 62 Stat. 930 (1948), 28 U.S.C.A. § 1331 provides: "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States." Prompted by questions from the court during oral argument, counsel for appellants filed a supplemental brief devoted in part to the contention that jurisdiction exists also by virtue of 28 U.S.C.A. § 1337. Section 1337 provides: "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

[2]44 Stat. 577 (1926) as amended to apply to the airline industry by 49 Stat. 1189 (1936), 45 U.S.C.A. §§ 151-88. Section 184 provides:

> "The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on April 10, 1936, before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief operation officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.
>
> It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of sections 181-188 of this title, to establish a board of adjustment of jurisdiction, not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 153 of this title. * * *"

Section 153, Second permits any carrier and its employees to agree "to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section." Section 153 (i) provides that "[t]he disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions * * * may be referred * * * to the appropriate division of the Adjustment Board. * * *"

establish a board of adjustment to settle disputes "growing out of grievances or out of the interpretation or application of any of the terms of [the collective bargaining agreement]". Pending the establishment of a permanent national board, similar to the National Railroad Adjustment Board, airlines and their employees are dependent upon contract for the establishment of adjustment boards.[3] Section 184 does not define the jurisdiction of a board, except to the extent of providing that a board shall have "jurisdiction not exceeding the jurisdiction which may be exercised by system, group, or regional boards of adjustment, under the authority of Section 153 of this title".[4] It is clear, therefore, that although the statute requires the parties to establish a board, without a contract there would be no board. It is also clear that the parties must look to the contract for the composition, procedures, and jurisdiction (within Section 153) of an airline system board of adjustment.

In April 1958 Central discharged six of its employees, the individual plaintiffs, because they refused, while under suspension from the Company, to attend a hearing at which the Company denied them the right to have a union representative present. The discharged employees went through the preliminary stages of a formal grievance proceeding without reaching settlement, and the Union appealed the case to the system board of adjustment. The board, composed of two company representatives and two union representatives, deadlocked on

[3] In referring to a similar airline system board the court said: "This Board is not the Railway Adjustment Board, whose powers and functions are fixed by the statute. This is a Board created by contract." Edwards v. Capital Airlines, D. C. Cir., 1949, 176 F. 2d 755, 760. See also National Airlines v. Metcalf, 5 Cir., 1959, 271 F. 2d 817.

[4] See footnote 2.

the case. The National Mediation Board then appointed a neutral referee. The five-member board held that Central's refusal to allow the grievants the right of representation and the discharge of the grievants violated the collective bargaining agreement. The board rendered an award ordering that the six discharged employees be reinstated without loss of seniority and with full pay during the term of their attempted discharge. Central refused to comply with the award on the ground that the board exceeded its jurisdiction and authority as set forth in the "Governing Agreement" between the parties "covering the establishment and maintenance of a System Board of Adjustment".

I.

The appellants' broadest contention, based on *Textile Workers v. Lincoln Mills*, 1957, 353 U. S. 448, 77 S. Ct. 912, 1 L. Ed. 2d 972, is that the rights asserted in their complaint are necessarily federal rights flowing from federal law. The management runs something like this: just as the Labor Management Act is a congressional mandate to federal courts to fashion federal law governing the substance of collective bargaining agreements under that act, the Railway Labor Act is a direction to create a body of substantive federal law governing the substance of collective bargaining agreements in the airline industry; the plaintiffs' cause of action comes from this new body of federal substantive law. Appellants recognize, of course, that Section 301 of the Labor Management Relations Act excludes any persons covered by the Railway Labor Act, but they contend that the two statutes, construed together, show a consistent statutory pattern.

A crucial difference between two statutes may be more significant than similarities. So it is here. Section 301 of the Labor Management Relations Act provides specifically for federal district court jurisdiction over suits involving collective bargaining agreements in industries affecting interstate commerce.[5] It was this provision that the Supreme Court interpreted in Lincoln Mills as "more than jurisdictional". In itself it was the statutory source for the congressional direction that federal courts "fashion a body of federal law for the enforcement of collective bargaining agreements". 353 U. S. 448, 451. But there is no specific statutory provision for district court jurisdiction over suits under Section 184 of the Railway Labor Act. Since Section 184 has no express grant of jurisdiction that is "more than jurisdictional" and has no language even remotely equivalent to Section 301, Section 184 of the Railway Labor Act lacks the foundation on which the Court, in Lincoln Mills, based its decision that federal law (even if it were necessary to fashion a body of federal law) governs the substance of collective bargaining agreements under the Labor Management Act.

It is also clear that Congress did not choose the direct course of providing that federal law, statutory or decisional, should control the substantive features of labor contracts in the airlines industry. Nothing in Section 184 indicates any

[5]Section 301 of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C.A. § 185 (a) provides:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

intention to affect the substance of collective bargaining agreements.[6] Section 184 of the Railway Labor Act relates solely to the procedure for settling disputes over the interpretation or application of the agreements. National policy, as expressed in the statute, requires that airlines and unions set up a procedure for settling grievances; federal law governs certain questions integral to this settlement process,[7] but the statutory purpose does not require that the underlying contract rights and duties be brought under federal law, and no inference to that effect can be drawn from any language in the statute. There is therefore no statutory necessity for fashioning an imposing edifice of substantive federal law as the jurisdictional basis for the rights asserted in this suit. *Terminal Railroad Ass'n of St. Louis v. Brotherhood of Railroad Trainmen*, 1943, 318 U. S. 1, 63 S. Ct. 420, 87 L. Ed.

[6] Duplisea v. Maine Central Railroad, 1 Cir., 1960, 260 F. 2d 496, was a suit against a railroad for wrongful discharge. In holding that there was no federal question jurisdiction, the Court said: "No doubt the Railway Labor Act is an 'Act of Congress regulating commerce' within the meaning of 28 U.S.C.A. § 1337. It would have been within the power of Congress to provide a federal cause of action for damages based upon a wrongful discharge of a railway employee in violation of the collective bargaining agreement. Cf. Textile Workers Union of America v. Lincoln Mills of Alabama, 1957, 353 U. S. 448, 77 S. Ct. 912, 1 L. Ed. 2d 972. If such a federal cause of action had been created, presumably the federal district court would have had jurisdiction, either under 28 U.S.C.A. § 1337, or under the more general provision of 28 U.S.C.A. § 1331, since more than $3,000 was involved. ¶ "But counsel for appellant was unable to point to any provison of the Railway Labor Act creating such federal cause of action. Nor have we been able to find any such provision. * * *" See also text to footnote 23.

[7] In Sigfred v. Pan American World Airways, 5 Cir., 1956, 230 F. 2d 13, 16-17, cert. denied, 351 U. S. 925, 76 S. Ct. 782, 100 L. Ed. 1455, this Court held that federal law governs the scope of judicial review of an award made by a system board of adjustment under § 184 of the Railway Labor Act, since the application of state law to this question would allow a freedom of review incompatible with the purpose of the statute to allow the parties to arbitrate their disputes with finality. In Sigfred, however, there was diversity of citizenship and enforceability of an award was not at issue.

571;[8] *Hettenbaugh v. Airline Pilots Ass'n International*, 5 Cir., 1951, 189 F. 2d 319.[9]

II.

The appellants, more narrowly than in the contention just discussed, argue that Section 184 providing for airline system boards of adjustment creates a federal right in the *enforcement of the award.*

On this point we consider our decision in *National Airlines v. Metcalf*, 5 Cir., 1959, 271 F. 2d 817 controlling. In Metcalf this Court faced substantially the same question at issue here, although, as the question was presented, the Court found it necessary to focus on the applicability of Section 153 (p)[10]

[8]In that case, 318 U. S. 1, Mr. Justice Jackson, organ of the court, stated:

"The Railway Labor Act * * * does not undertake governmental regulation of wages, hours, or working conditions. Instead it seeks to provide a means by which agreement may be reached with respect to them. The national interest expressed by those Acts is not primarily in the working conditions as such. So far as the Act itself is concerned these conditions may be as bad as the employees will tolerate or be made as good as they can bargain for. The Act does not fix and does not authorize anyone to fix generally applicable standards for working conditions. The federal interest that is fostered is to see that disagreement about conditions does not reach the point of interfering with interstate commerce."

[9]In Hettenbaugh, 189 F. 2d 319, 320, this Court held:

"Likewise, the complaint does not state a federal question. To pose a federal question, there must be an allegation of a violation of some right granted by a federal statute or by the federal constitution. No violation of any such right is alleged. The most the complaint does in this case is to allege that the National Airlines was subject to the terms of the Railway Labor Act, and that the appellee had deliberately violated the obligation imposed on it by the act for the purpose of defeating the lawful objective sought to be obtained by said Act."

[10]45 U.S.C.A. § 153 establishes the National Railroad Adjustment Board and provides a series of rules to govern its operation. Subsection (p) provides:

"If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States * * * a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board. * * *"

to an award of a system board rather than on the federal question issue. This Court squarely held that in non-diversity cases an airline system board award is not enforceable in the federal courts under Section 184. In Metcalf, as in the instant case, an aggrieved employee sued to enforce an award of a system board established under Section 184 of the Railway Labor Act. The plaintiff contended that Section 153(p), establishing federal jurisdiction to enforce an award granted by the National Railway Labor Adjustment Board, applied to awards of an airline system board. This Court distinguished between awards of the National Railway Labor Adjustment Board and lower-status awards of an airline system board: the awards of an airline system board, unlike those of the National Railway Adjustment Board, carry "no legislative determination as to their finality or as to their being a basis of federal suit jurisdiction".[11] Judge Tuttle, speaking for the Court, held: "[T]he legislative digest of Congress is clearly expressed. Such design is to grant to those winning arbitration awards the right to sue on them in federal courts only when and if the Mediation Board creates a National Air Transport Adjustment Board whose award is ignored or not

[11] In Metcalf, 271 F. 2d 817, 819, the Court stated:

"Congress made even more clear that it was not elevating to the same rank the status of an award by such *system* board in the airline industry as was granted to an award of the National Railway Labor Adjustment Board by then providing in Section 185 for the future creation of a similar National Board for the air industry when in the judgment of the National Mediation Board 'it shall be necessary to have a permanent national board of adjustment.' * * * All the provisions of the Railway Labor Act are adopted for the air industry except section 153; instead of giving similar relief to [§] 153, special provision is made for adjustment of labor disputes by system or regional boards with no legislative determination as to their finality or as to their being the basis of federal suit jurisdiction.".

complied with by the carrier. Then only does Section 153(p) become operative in the air industry." 271 F. 2d 817, 820.

At appellants strongly urged request to take a fresh look at the jurisdictional issue notwithstanding Metcalf, we have examined the statute in its entirety.

As previously stated, the Act is bare of any provision for federal court enforcement of system board awards; and we have not found, nor have appellants pointed out, any provision carrying the implication that such enforcement was intended. See *Duplisea v. Maine Central Railroad*, 1 Cir., 1960, 260 F. 2d 495. The Union contends that Congress must have envisaged federal jurisdiction of system board awards, since the provision for an adjustment proceeding is ineffectual if its results are not enforceable in the federal courts; Congress would not have established a system of half-way measures.[12] This argument loses its force when the statutory purposes is considered with reference to prevailing state law at the time of enactment. In 1936 courts in nearly all states treated a suit to enforce an agreement to arbitrate differently from a suit to enforce an arbitration award. Under common law an agreement to submit disputes to arbitration was revocable until an award was rendered, and would not prevent

[12]State courts would be required to recognize the validity of arbitration agreements established under the federal law. In Metcalf, 271 F. 2d 817, 820, this Court said:

"The argument made by Appellant that the statute must be construed so as to give the District Court jurisdiction because otherwise he is without a remedy to enforce a federally enacted right is, of course, without foundation. The state courts have full and complete jurisdiction to grant relief on such an alleged contractual right. There is nothing unusual in the holding that the state courts apply the federal law just as do the federal courts if the cause is one as to which the federal law controls."

For a discussion of a state's constitutional obligation to enforce federally created rights see Comment, 73 Harv. L. Rev. 1551 (1960).

a suit on the contract.[13] *Lakube v. Cohen*, 304 Mass. 156, 23 N. E. 2d 144 (1939). Statutes enacted to make arbitration agreements enforceable generally were limited to agreements concerning existing disputes. Only the statutes patterned on the New York Draft Act extended enforceability to future-dispute agreements,[14] and some of these excluded arbitration agreements in employment contracts. As late as 1950 a study revealed that,

> "there is a total of ten states in which future-disputes clauses appearing in collective bargaining agreements will be enforced. [Cal., Col., Conn., Del., La., Mass., N. J., N. Y., Pa., Wash.]. In the remainder of the states, and in the federal courts (with some minor variances) future-disputes clauses may be disregarded with impunity." Gregory and Orlikoff, The Enforcement of Labor Arbitration Agreements, 17 U. Chi. L. Rev. 233, 241-42 (1950).

Statutes validating future-disputes clauses did not cover the full range of labor disputes; generally they were limited to disputes which could be the subject of an action at law or equity in a civil proceeding. Gregory and Orlikoff, *supra* at 242. On the other hand, the judicial approach in state courts *after* arbitration has already taken place has almost invariably shown a healthy respect for enforcement of an award.

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[13] See generally Sturges, Commercial Arbitration and Awards §§ 15, 18, 76-83 (1930); Wolaver, The Historical Background of Commercial Arbitration, 83 U. Pa. Rev. 132, 138-44 (1934).

[14] "The New York Arbitration Law (1920) was the first American statute to expressly embrace agreements to arbitrate future disputes. * * * The Draft Act, advocated by the American Arbitration Association, which is the basis of arbitration statutes in twelve states and of the United States Arbitration Act, 43 Stat. 883-886 (1925), 9 U.S.C.A. §§ 1-15 (1934), is patterned after the New York Arbitration Law." 26 Va. L. Rev. 327. See generally Simpson Specific Performance of Arbitration Contracts, 83 U. Pa. L. Rev. 161 (1934).

Even at common law an award was valid and binding on the parties. Enforcement could be obtained by an action at law upon the award itself. *Fuerst v. Eichberger*, 224 Ala. 31, 138 So. 409 (1931). The award winner could sue in equity for specific performance. *United Fuel Gas Co. v. Columbian Fuel Corporation*, 4 Cir., 1948, 165 F. 2d 746. Or the award could be pleaded to bar action on the original claim by the award loser. *Rhodes v. Folmar*, 208 Ala. 595, 94 So. 745 (1922). Numerous state statutes were designed to facilitate enforcement of awards. "In many jurisdictions the award, when filed in court, could automatically be made the basis of a judgment; in others, of a motion to confirm, after which judgment would be entered." Phillips, Rules of Law or Laissez-Faire in Commercial Arbitration, 47 Harv. L. Rev. 590, 592 (1934). See Sturges, Commercial Arbitration and Awards, §§ 308-59 (1930). These statutes varied greatly in their coverage and their procedural requirements and courts in different states varied greatly in the extent of the review which they gave to arbitration awards, but, broadly speaking, state courts could be relied on to give effect to an arbitration award, in contrast with their unwillingness to enforce executory submission agreements. In the light of this historical context it cannot be said that a federal law imposing a requirement of compulsory arbitration but not providing for federal court enforcement of the arbitration award is a half-way measure.

The purpose of the Railway Labor Act is to provide prompt and orderly settlement of labor controversies in order to avoid disruption of the national transportation system by requiring

arbitration of disputes.[15] Agreements to arbitrate in the airline industry were all voluntary before the 1936 Act, and the lack of enforceability undoubtedly reduced the incentive to contract for arbitration. Thus, even without any federal enforcement in non-diversity cases, the statute accomplished a major national objective in requiring an arbitration agreement in every airline employment contract. Construing the Act as not in itself furnishing an independent basis of jurisdiction for enforcement of awards does not mean that there would be no compliance with the arbitration agreements. There would often be voluntary compliance, of course, and there would be legal enforcement of the agreements in actions brought in state courts and in diversity actions in federal courts.

There are various reasons why Congress might have preferred to limit federal regulation to the requirement of arbitration rather than include enforcement of the award. Congress might have considered it more appropriate to leave this function to the state courts, because the contract questions involved would be governed by state law. Congress might not have wished to impose additional burdens on the federal district courts. In the ten years following the enactment of the Railway Labor Act in 1926 the states had become more receptive to arbitration; it is a fair inference that Congress might have concluded that federal enforcement of the arbitration awards was unnecessary. Whatever the motivation, the

[15] 45 U.S.C.A. § 151 (a) outlines the general purposes of the Railway Labor Act as follows:

> "The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein • • • (5) to provide prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions."

1936 amendment extending the Railway Labor Act to the airline industry does not go as far in establishing federal control over the settlement process as the original Act, under which the adjustment proceeding itself is conducted by government officials with a national board of adjustment. This difference in congressional treatment of the railroad industry as against the airline industry, and between these industries and other industries, cannot be ignored.

We are not asked to decide whether Congress provided substantive rights enforceable by a court of competent jurisdiction. The question is simply whether federal district courts are to enforce airline arbitration awards in non-diversity actions. Such enforcement is not necessary to accomplish the purpose of the statute. Federal district courts are courts of limited jurisdiction.[16] On the tenuous basis suggested here, we do not feel free to hold that the Act impliedly provides federal enforcement of an airline system board award as an independent basis for district court jurisdiction.

III.

The decisions dealing with federal question jurisdiction cannot easily be harmonized.[17] There is general agreement,

[16]Chicot County Drainage District v. Baxter State Bank, 1940, 308 U. S. 371, 60 S. Ct. 317, 84 L. Ed. 329; Gillis v. California, 1934, 293 U. S. 62, 55 S. Ct. 4, 79 L. Ed. 199; Neirbo Company v. Bethlehem Shipbuilding Corporation, 1939, 308 U. S. 165, 60 S. Ct. 153, 84 L. Ed. 167.

[17]In general, see Willard, When Does a Case "Arise" under Federal Laws? 45 Am. L. Rev. 373 (1911); Chadbourn and Levin, Original Jurisdiction of Federal Questions, 90 U. Pa. L. Rev. 639 (1942); Forrester, The Nature of a Federal Question, 17 Tulane L. Rev. 363 (1942); Federal Question Jurisdiction and Section 5, 18 id. 263 (1943); Bergman, Reappraisal of Federal Question Jurisdiction, 46 Mich. L. Rev. 17 (1946); Fraser, Some Problems in Federal Question Jurisdiction, 49 Mich. L. Rev. 73 (1950); Mishkin, The Federal "Question" in the District Courts, 53 Colum. L. Rev. 157 (1953); London, "Federal Question" Jurisdiction,—A Snare and a Delusion, 57 Mich. L. Rev. 834 (1959); Hart and Wechsler, Federal Courts and the Federal System (1953), esp. 763-769. See also notes, Necessity that Federal Question Appear in the Complaint, 8 Wash & Lee L. Rev. 89 (1951); 3 Vand. L. Rev. 320 (1950).

however, on one principle: an action does not arise under federal law, for purposes of Sections 1331 and 1337 of the Judicial Code, unless the complaint, without benefit of the answer, discloses affirmatively a federally-created cause of action.[18] A mere reference to a federal act and an assertion that Section 1331 applies are not sufficient to show that the case arises under federal law.[19] This is not a matter of the sufficiency of pleadings under Rule 8, FRCP, but a matter of the plaintiff being able to demonstrate at the start of litigation that he is entitled to have a federal court hear his case.[20] Here the complaint fails to show an "arising under" claim. Amended pleading could not cure the defect.

The right asserted by the plaintiffs is a creature of contract, not a creature of a federal law. A reading of the complaint shows a claim originating in contract and based on violation of a contract. The system board of adjustment

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[18]Metcalf v. Watertown, 1888, 128 U. S. 586, 9 S. Ct. 173, 32 L. Ed. 543; Tennessee v. Union Planters Bank, 1894, 152 U. S. 454, 14 S. Ct. 654, 38 L. Ed. 511; Louisville & Nashville R. Co. v. Mottley, 1908, 211 U. S. 149, 29 S. Ct. 42, 53 L. Ed. 126. In each of these cases the court's decision turned on whether the plaintiff's right was created by state law or by federal law, even though the outcome would depend on the determination of a federal question. See London, Federal Question Jurisdiction 57 Mich. L. Rev. 835, 848 (1959).

[19]Doby v. Brown, 4 Cir., 1956, 232 F. 2d 504, cert. den. 352 U. S. 837, 77 S. Ct. 57, 1 L. Ed. 2d 55; Beistline v. City of San Diego, 9 Cir., 1958, 256 F. 2d 421, cert. den. 358 U. S. 865, 79 S. Ct. 96, 3 L. Ed. 2d 98. See also Gully v. First National Bank in Meridian, 299 U. S. 109, 57 S. Ct. 96, 81 L. Ed. 70.

[20]Chief Justice Marshall's dictum in Osborn v. United States, 1824, 9 Wheat. 738, 823, 6 L. Ed. 204, still stands: "The right of the plaintiff to sue cannot depend on the defense which the defendant may choose to set up. His right to sue is anterior to that defense, and must depend on the state of things when the action is brought." "Since the federal courts are courts of limited jurisdiction it is natural that their jurisdiction be made to appear at the time it is invoked. This means that in the case of an action commenced in the federal court and hence invoking its original jurisdiction the natural and logical principle requires the federal question to appear in the complaint, well pleaded, and without anticipation of defenses." Moore's Commentary on the Judicial Code, ¶ 0.03 (22), p. 143 (1949).

was established by private contract. The grievances presented alleged violations of contract, not violations of the Railway Labor Act. The grievants followed the grievance procedure stipulated in the contract. The board, established by contract to settle grievances, purportedly acted under authority as defined in the contract. The board rendered an award for violation of the contract, not for violation of the Railway Labor Act. This award rests on the board's interpretation of the contract. When it came to filing suit, the individual plaintiffs did not sue for wrongful discharge under the Act but for enforcement of the arbitration award. Properly enough, they did not allege in their complaint that the award was within the Board's jurisdiction or that the defendant denied the authority and jurisdiction of the board to make the award; assertion of the board's jurisdiction to make the award is not an essential part of such a claim. To make out a cause of action, *sustainable by a court of competent jurisdiction*, it was necessary for the plaintiffs to show only the contract (here attached to the complaint), the alleged violation of the contract, the submission of the dispute to the board in accordance with the contract, and the award in their favor. The "obligation of the contract being a creation of the state" and the "suit being built upon a contract", there "is no necessary connection between the enforcement of such a contract according to its terms and the existence of a controversy arising under federal law".[21]

A federal question can come into this case only by way of the plaintiffs' assuming that the defendant, as a defensive

[21]Gully v. First National Bank in Meridian, 1936, 299 U. S. 109, 57 S. Ct. 96, 81 L. Ed. 70.

matter, will attack the authority and jurisdiction of the board; that such defense will require a construction of the Railway Labor Act, especially since the contract defines the board's jurisdiction in language that parallels Section 153 (i) of the Act.[22] It is established beyond dispute, however, that where a federal question comes into a case only as a part of the defense, federal jurisdiction does not exist under Section 1331 and 1337. In a leading decision denying jurisdiction in a similar situation the Supreme Court summarized the principle as follows:

> "Ever since Metcalf v. City of Watertown, 128 U. S. 586, 589, it has been settled doctrine that where a suit is brought in the federal courts 'upon the sole ground that the determination of the suit depends upon some question of a federal nature, it must appear at the outset, from the declaration or the bill of the party suing, that the suit is of that character.' But 'a suggestion of one party that the other will or may set up a claim under the Constitution or laws of the United States does not make the suit one arising under the Constitution or those laws.' State of Tennessee v. Union & Planters' Bank, 152 U. S. 454, 464. The plaintiff's claim itself must present a federal question 'unaided by anything alleged in anticipation or avoidance of defenses which it is thought the defendant may interpose." Skelley Oil v. Phillips Petroleum Co., 1950, 339 U. S. 667, 672, 70 S. Ct. 876, 879, 94 L. Ed. 1194, 1200.

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[22]The collective bargaining agreement provides:

"(e) The Board shall have jurisdiction over disputes between any employee covered by the Mechanics' Agreement and the Company, growing out of grievances or out of interpretation or application of any of the terms of the Mechanics' Agreement. The jurisdiction of the Board shall not extend to proposed changes in hours of employment, rates of compensation, or working conditions covered by existing agreements between the parties hereto."

For language of Section 153 (i), see footnote 2.

Since it is not part of the plaintiff's case to establish that the board acted within its jurisdiction, the instant case falls squarely within this rule.

IV.

It is not enough that in the background a federal law compelled the parties to enter into the contract. "A suit", said Mr. Justice Holmes, "arises under the law that creates the cause of action"; the fact that justification for an alleged wrong may depend upon the federal patent law "is no more material to the question under what law the suit is brought than it would be in an action of contract." *American Well Works v. Layne & Bowler Co.*, 1916, 241 U. S. 257, 36 S. Ct. 585, 60 L. Ed. 987. If a cause of action is state-created, federal jurisdiction cannot be predicated on the fact that the outcome of the case may turn on an incidental federal question. It is the suit, "not a question in the suit, that must arise under the laws of the United States." Mr. Justice Holmes, dissenting in *Smith v. Kansas*, 1921, 255 U. S. 180, 41 S. Ct. 243, 65 L. Ed. 577. The Supreme Court adopted the Holmes test in two later leading cases.[23] In *Puerto Rico v. Russell & Company*, 1933, 288 U. S. 476, 483, 53 S. Ct. 447, 449-50, 77 L. Ed. 903, 909, the Court couched the principle in straight

[23]McGoon v. Northern Pacific Railway Co., D.C.N.D., 1913, 204 F. 2d 998, a case often cited, states the rule: "[T]he following is a correct affirmative rule: Whenever federal law grants a right of property or of action, and a suit is brought to enforce that right, such a suit arises under the law creating the right, within the meaning of statutes defining the jurisdiction of federal courts. * * * What, then, do the courts mean when they say that the construction of federal law must be involved in order to confer this jurisdiction? Certainly not that the case will necessarily turn upon an interpretation of the statute, but simply that the complaint must set forth a cause of action of which federal law is an essential ingredient, and which may, therefore properly involve a construction of that law."

Holmesian language. Again, Mr. Justice Cardozo said, in *Gully v. First National Bank in Meridian*, 1936, 229 U. S. 109, 111, 57 S. Ct. 96, 81 L. Ed. 70: "Federal jurisdiction may be invoked to vindicate a right or privilege claimed under a federal statute. It may not be invoked where the right asserted is non-federal, merely because the plaintiff's right to sue is derived from federal law, or because the property involved was obtained under federal statute. The federal nature of the right to be established is decisive." If we look far enough "countless claims of right can be discovered to have had their source or their operative limits in the provisions of a federal statute", but it is "the federal nature of the right to be established that is decisive". "To bring a case within [Section 1331], a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action." It might be said that here the Railway Labor Act was an ingredient of the plaintiffs' claim, since the adjustment procedure was a result of the Act, but the Act simply provided the impetus for the contract creating the right of action.

This Court applied these principles in *Amalgamated Association of Street Electric Railway and Motor Company Employees v. Southern Bus Lines*, 5 Cir., 1951, 189 F. 2d 219, 221, a non-diversity action by a union to compel an employer to arbitrate proposed changes in a contract of employment. The Union contended that the suit arose under the United States Arbitration Act, just as the appellants here rely on the Railway Labor Act. This Court stated:

> "Upon the allegations of the complaint, we think it clear that the court below did not have jurisdiction over

> this controversy. No facts are alleged upon which the conclusion can legitimately be based that the District Court independently of the arbitration agreement would have jurisdiction of the 'subject matter of a suit arising out of the controversy between the parties' as required by Section 4 of the Federal Administration Act, 9 U. S. C. A., par. 4 . . . Viewing the case at bar against this background of established principle, we do not find in it the elements of federal jurisdiction. What is here involved is merely a controversy between the parties as to the construction of a contract which allegedly arises out of the laws of the United States respecting collective bargains between employer and employees in interstate commerce; but the right of action asserted does not arise out of those laws but only arises from the subsequent contractual relations of the parties. The wrongful breach of such relations does not confer federal court jurisdiction unless there is diverse citizenship."[24]

Duplisea v. Maine Central Railroad, 1 Cir. 1960, 260 F. 2d 495, was an action under the Railway Labor Act against a railroad for alleged wrongful discharge of the plaintiff.[25] In affirming an order of dismissal for lack of jurisdiction, the Court said:

> "The complaint is conveniently vague as to the basis of federal jurisdiction. . . . Nor is there any allegation of a breach of a duty imposed or the violation of a right given by the Constitution, the Railway Labor Act, or any other federal statute. . . . Nor does the complaint raise any question as to the validity, construction, or effect of the Constitution or of any law of the United States. On the contrary, under the terms of the complaint, plaintiff seeks damages for an alleged wrongful

[24]For other cases holding that the Arbitration Act does not furnish an independent basis for jurisdiction, see Amalgamated Association v. Southern Bus Lines, 5 Cir., 1951, 189 F. 2d 219; Krauss Bros. Lumber Co. v. Louis Bossert & Sons, Inc., 2 Cir., 1933, 62 F. 2d 1004; In re Woerner, 2 Cir., 1929, 31 F. 2d 283; Mengel Co. v. Nashville Paper Products and Specialty Workers Union, 6 Cir., 1955, 221 F. 2d 644.

[25]See footnote 6 for an additional quotation from this opinion.

discharge in violation of the terms of a collective bargaining agreement negotiated by the Railroad and the Brotherhood of Railroad Trainmen under the provisions of the Railway Labor Act."

See also *Hayes v. Union Pac. R. Co., et al.*, 9 Cir., 1950, 184 F. 2d 337[26] and *Shipley v. Pittsburgh & L. E. R. Co.*, 1947, D. C. Pa., 70 F. Supp. 870.[27]

Appellants rely on *Peyton v. Railway Express Agency*, 1942, 316 U. S. 350, 62 S. Ct. 1171, 86 L. Ed. 1525 and *Crispin Company v. Lykes Brothers Steamship Company*, 1955,

[26]Hayes v. Union Pac. R. Co., et al., 9 Cir., 1950, 184 F. 2d 337, involved the question whether the district court had jurisdiction under the Railway Labor Act of an employee's complaint charging racial discrimination in the performance of a collective bargaining agreement. The Court held that there was no federal question:

"[I]t is clear to us that the Federal Courts are not charged by federal law with the duty or function of policing the parties in the performance of collective bargaining agreement entered into pursuant to the Railway Labor Act. Congress did not, by the Railway Labor Act, grant jurisdiction to the Federal Courts to afford relief for breaches of performance of collective bargaining agreements. Appropriate tribunals have been established for that purpose. 45 U. S. C. A. § 153; National Railroad Adjustment Board; Slocum v. D. L. & W. R. Co., 339 U. S. 239, 70 S. Ct. 577. It is only when collective bargaining agreements are unlawfully entered into or when the agreements themselves are unlawful in terms or effect, that federal courts may act. This is made quite clear by the Supreme Court in Steele v. L. & N. R. Co., 323 U. S. 192, 65 S. Ct. 226, 89 L. Ed. 173, and Turnstall v. Brotherhood, 323 U. S. 210, 65 S. Ct. 235, 89 L. Ed. 187. * * *"

[27]In Shipley v. Pittsburgh & L. E. R. Co., 1947, D. C. Pa., 70 F. Supp. 870, twenty railroad employees sued to recover extra compensation under a contract authorizing extra pay for performance of special duty. The court, in holding that the Railway Labor Act did not confer "arising under" federal jurisdiction, said:

"[T]he present suit is based on the provisions of a private contract entered into between the bargaining agent of the plaintiffs and the defendant company. The obligation of the contract is a creation of the state * * * Nothing in the present suit involves the validity, construction or affect of the Railway Labor Act upon which the result of this action depends. Although the parties to this proceeding were governed by the act, the right of action, if one exists, is based on the alleged breach of a custom which it is alleged should be considered a part of the contract; the cause of action does not arise under the Railway Labor Act but only from the consequent contractual relations of the parties."

134 F. Supp. 704. We consider these cases inapplicable. Peyton was an action under the Carmack Act against a common carrier for items lost or damaged in interstate shipment. Crispin arose under the Carriage of Goods by Sea Act. Both statutes regulate in great detail the substantive obligations of the shipper-carrier relation. As the court said in Crispin: "[T]he only duty which the defendant owes plaintiffs springs from the shipper-carrier relation . . . [W]hether the complaint sounds in tort or in contract, the obligations, responsibilities and liabilities which result from the shipper-carrier relation are circumscribed by the terms of the statute." That is not the case here. The Railway Labor Act leaves to the parties the right to decide their obligations, responsibilities, and liabilities. The only statutory limitation is the requirement of a provision in the contract for arbitration and even this provides only that the board's jurisdiction shall not exceed the jurisdiction authorized under Section 153. This suit is nothing more than a state-created action to construe a contract.

It may seem ironical that of all the large industries engaged in interstate commerce only in the airline industry are parties to a collective bargaining agreement denied access to federal courts in non-diversity cases for the purpose of enforcing arbitration awards. If any industry should have ready access to federal courts because of the interstate character of its business, it is the airline industry. The answer we must discipline ourselves to give, however, is that federal district court jurisdiction is created only when Congress has provided for it; if the legislative

pattern creates an anomaly, it is not for the courts to override the statutory dictates.[28] Here, jurisdiction lies with the state courts of Tarrant County, Texas.

Judgment is

AFFIRMED.

[28]Irregularity in the legislative pattern is unfortunate, but it is not surprising in view of the fact that laws affecting similar problems in related areas may be enacted at different times and by different legislators. This is a case in point. The Railway Labor Act was enacted in 1926. The amendment of the Railway Labor Act extending most of its provisions to the airlines industry was passed in 1936. And the Labor Management Relations Act, which contains Section 301 relied on in Lincoln Mills, was enacted in 1947.

APPENDIX B

DISSENTING OPINION:

BROWN, Circuit Judge, Dissenting:

It is a paradox that the strength of the Court's opinion is that the result does not make sense. Of course the Court is not quite that harsh in its characterization of the result, but after spending pages demonstrating why Congress must have looked to the varying attitude of 48 states for the enforcement of industrial arbitral decisions thought necessary to secure continuity to interstate air commerce, the Court puts it no less plainly in this euphemism: "If any industry should have ready access to federal courts because of the interstate character of its business, it is the airline industry." —F. 2d—, —.

The strength is derived from the inescapable historical fact that Congress also errs, and that if, as a consequence, the legislative machinery thus established is not adequate, the deficiency cannot be supplied by the Judiciary. But we ought to be very certain that the result is both inescapable and may not be bridged over by legitimate statutory interpretation within the traditional competence of the courts.

Of course my disagreement with this opinion carries with it a like difference with our earlier one in *Metcalf v. National Airlines, Inc.*, 5 Cir., 1959, 271 F. 2d 817.[29] The thesis

[29] As the briefs in that case reflect, all—the parties and this Court—were preoccupied with the jurisdictional amount of $3,000 under 28 USCA § 1331. No mention was made of § 1337.

of that case, echoed here, is that Congress deliberately chose to have the federal right vindicated in state courts.[30] That highlights this curious result. Under this case, *Metcalf*, and more directly under *Sigfred*,[31] the law to be applied by the tribunal is federal law. This presupposes that the right is of federal origin—here specifically under 45 USCA §§ 181-188. Yet our present opinion proceeds on the assumption that the *contract* is a creature of state law. I am unable to comprehend how a contract compelled by federal law and to be interpreted by courts under federal law principles may realistically be characterized as a creation of the state, so that a suit to enforce it is not one "arising under" federal law.

Air carriers and their employees are compelled to provide for industrial arbitration through System Boards of Adjustment. That was a recognition that serious disputes involving the most troublesome problems of constitutional law, due process and the like were being committed to tribunals made up of airplane pilots, aircraft engineers, mechanics and similar employees wholly untrained in the law or the business of judging. Moreover, it contemplated

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[30]See footnote 12, supra. In these words we recognized that it was a federal right subject to federal principles: "There is nothing unusual in the holding that the state courts apply the federal law just as do the federal courts if the cause is one as to which the federal law controls." 271 F. 2d 817, 820.

[31]Sigfred v. Pan American World Airways, 5 Cir., 1956, 230 F. 2d 13, 16-17, cert. denied, 351 U. S. 925, 76 S. Ct. 782, 100 L. Ed. 1455, discussed in note 7, supra.

decision by boards made up of partisans with a neutral chairman only if needed to prevent an impasse.[32]

If there is anything clear in this legislative muddle, it is this: Congress in 1936 could not seriously have thought that stability and continuity to interstate air commerce would come from the undulating policies and frequently demonstrated hostilities of the legislatures and courts (or both) of 48 states in the enforcement of anything thought so essential to industrial peace as this system of governmentally compelled arbitration. Indeed, §§ 181-188 expressly include by reference §§ 157-159. These actions of the Railway Labor Act provide for arbitration over and beyond action before the Adjustment Board or the Mediation Board. These sections make the decision of the Board of Arbitration reviewable and enforceable solely in the United States District Courts. 45 USCA § 157, § 158 (k) (1), § 159, First, Second.

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[32]The Court apparently sees some basis for congressional distinction between system, group or regional boards of adjustment under § 184 pending establishment of a National Air Transport Adjustment Board under § 185 and those of § 153 on the ground that the National Railroad Adjustment Board is a governmental tribunal. The Court says: "Whatever the motivation, the 1936 Amendment extending the Railway Labor Act to the airline industry does not go as far in establishing federal control over the settlement process as the original Act, under which the *adjustment proceeding itself is conducted by government officials with a national board of adjustment.* This difference in congressional treatment of the railroad industry as against the airline industry, and between these industries and other industries, cannot be ignored." F. 2d , . (emphasis added)

Of course this is erroneous. The Railroad Adjustment Board and its four Divisions are each made up of partisan appointees of labor and management. Government enters the picture only through the designation of a neutral umpire and the payment of his compensation by the National Mediation Board. See 45 USCA § 153 (g) (h) (k) (1). The National Mediation Board does, of course, bear the burden of compensation paid to certain staff clerks and assistants of the Adjustment Board. 45 USCA § 153 (t).

Whether for an airlines labor controversy the submission to and processing by a § 184 System Board of Adjustment constitutes such a § 157 "arbitration," I need not decide. What is plain is that any such § 157 arbitration is the substantial equivalent of the arbitration award discussed at great length in Part II of the Court's opinion. There the Court develops the thesis that Congress was optimistic that whereas state courts would be hostile to executory contracts to arbitrate, they would give cordial, effectual welcome to completed arbitration awards.[33] Here § 157 is proof, however, that where the decision partakes of an agreed contractual arbitration which has proceeded through decision, Congress recognized that the proper, and only proper, tribunal for review and enforcement was the federal system.

The result becomes even more incongruous if it is assumed that an arbitration decision of an airways System Board of Adjustment made pursuant to a collective bargaining contract under compulsion of § 184 is not a § 159 arbitration. According to this Court, "jurisdiction" of a suit for the enforcement of a System Board of Adjustment award "lies with state courts of Tarrant County, Texas." — F. 2d —, —. If, as to this very controversy, the parties would have prepared an agreement of arbitration under § 157, it is expressly required that review and enforcement be solely in the local United States District Court. If Congress, with its rather rich experience in the jealous hostility of the Judiciary to lay arbitration[34] was content with state tribunals as the sole effective means of endorsement of the compulsorily required

[33] See notes 12 through 15 and related text. ..... F. 2d ..... , ...

[34] See United States Arbitration Act, 9 USCA §§ 1-14 (1925).

contractual arbitration, it is strange indeed that it prescribed the federal route as to § 157 arbitration.

I do not mean to overemphasize § 157 as a technically precise investment of federal jurisdiction. We are searching for probable congressional intent. In that quest it points the way that Congress surely thought that for interstate air commerce it was essentital that one system, and only one system, should undertake to police and enforce labor relations between air carriers and their employees. It must be remembered that the airline Labor Act was a complete departure from the existing structure. Whereas the National Labor Relations Board had only the power to protect bargaining in good faith, the airline Labor Act brought into play the National Mediation Board (§ 183) for the solution of "major" disputes—those on which the parties had not made a contract.[35]

It is inconceivable to me that with respect to contracts induced by the operation of the National Mediation Board under § 183 and the incorporation of §§ 151-152 and §§ 154-156, Congress at the same time meant for enforcement of arbitration decisions under such contracts to be committed to the unknown, unpredictable and uncontrollable attitudes of 48 states. Nor the least of the absurdities is that an airplane flies from state to state. What state is to be the forum?[36]

[35]Elgin, Joliet & Eastern R. Co. v. Burley, 1945, 325 U. S. 711, 722-728, 65 S. Ct. 1282, 89 L. Ed. 1886; Brotherhood of Railroad Trainmen v. New York Central R. Co., 6 Cir., 1957, 246 F. 2d 114, cert. denied, 355 U. S. 877, 78 S. Ct. 140, 2 L. Ed. 2d 107; Norfolk & P.B.L. R. Co. v. Brotherhood of Railroad Trainmen, 4 Cir., 1957, 248 F. 2d 34, cert. denied, 355 U. S. 914, 78 S. Ct. 343, 2 L. Ed. 2d 274.

[36]The selection of the state is only the beginning. What local law of the local state applies? For example, in Texas is it the Arbitration Act, TEX. CIV. STAT. arts. 224-238 (Vernon 1959), or the special one covering labor controversies in arts. 239-249, or the case-made law? See 6 Tex. Jur. 2d Arbitration and Award §§ 54-57 (1959).

What state was the parent of this creature—the consensual contract containing the agreement to arbitrate? May any or all of the states beneath the route or routes traveled by the airline be resorted to? Is the continuity of essential air traffic to be at the plaintiff's choice of forum? What is to happen when several plaintiffs bring several suits in several states? Is effective federal control of an operational activity deemed so essential to national welfare to be precariously dependent upon the accident of diversity of citizenship?

Of course this Court does not shirk the obvious answers to these queries. It avoids them as ironical proof either of congressional aberration, of indecision or, more questionable, a conscious choice of turning it all back to 48 states. And under some ascetical discipline demonstrating real judicial restraint because the result is so obviously unsound, it despairs that with the signs all pointing one way, a barricade was somehow left across the road.

Just as *Lincoln Mills* cut through similar logical considerations to effectuate a clearly revealed policy, so here industrial arbitration compelled under §§ 181-188 is so much a part of the legislative machinery to protect the free flow of interstate air commerce that effectual enforcement of an award is realistically the assertion of a claim arising under a law regulating commerce.

I therefore respectfully dissent.

APPENDIX C

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JUDGMENT

No. 18286

Extract from the Minutes of October 13, 1961.
INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, R. K. DOUD, S. V. CORNSTUBBLE, O. L. BROOM, C. R. CASEY, P. R. DAVIS AND E. E. FUQUA,

versus

CENTRAL AIRLINES, INC.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, International Association of Machinists, AFL-CIO, R. K. Doud, S. V. Cornstubble, O. L. Broom, C. R. Casey, P. R. Davis and E. E. Fuqua, and the surety on the appeal bond herein, Ray E. Cotnoir, be condemned, in sollee, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

Brown, Circuit Judge dissenting.

APPENDIX D

The relevant provisions of the Railway Labor Act (44 Stat. L. 577, as amended; 45 U.S.C. §§151-163, 181-188) are as follows:

TITLE I

"Sec. 2. Section 2 of the Railway Labor Act is amended to read as follows:

"GENERAL PURPOSES

"(1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

"GENERAL DUTIES

"First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

• • •

"Sec. 3. First. There is hereby established a Board, to be known as the 'National Railroad Adjustment Board' . . .

• • •

"(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

"(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

"(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted at any place designated by the division: *Provided, however,* That final awards as to any such dispute must be made by the entire division as hereinafter provided.

"(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as 'referee,' to sit with the division as a member thereof and make an award. Should the division fail to agree upon and select a referee within ten days of the

date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this Act for the appointment of arbitrators and shall fix and pay the compensation of such referees.

"(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except in so far as they shall contain a money award. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute.

"(n) A majority vote of all members of the division of the Adjustment Board shall be competent to make an award with respect to any dispute submitted to it.

"(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay the employee the sum to which he is entitled under the award on or before a day named.

"(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the

Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board."

• • •

"(w) Any division of the Adjustment Board shall have authority, in its discretion, to establish regional adjustment boards to act in its place and stead for such limited period as such division may determine to be necessary. Carrier members of such regional boards shall be designated in keeping with rules devised for this purpose by the carrier members of the Adjustment Board and the labor members shall be designated in keeping with rules devised for this purpose by the labor members of the Adjustment Board. Any such regional board shall, during the time for which it is appointed, have the same authority to conduct hearings, make findings upon disputes, and adopt the same procedure as the division of the Adjustment Board appointing it, and its decisions shall be enforceable to the same extent and under the same processes. A neutral person, as referee, shall be appointed for service in connection with any such regional adjustment board in the same circumstances and manner as provided in paragraph (1) hereof, with respect to a division of the Adjustment Board.

"Second. Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this Act, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board."

* * *

"Sec. 7. First. Whenever a controversy shall arise between a carrier or carriers and its or their employees which is not settled either in conference between representatives of the parties or by the appropriate adjustment board or through mediation, in the manner provided in the proceeding sections, such controversy may, by agreement of the parties to such controversy, be submitted to the arbitration of a board of three (or, if the parties to the controversy so stipulate, of six) persons: *Provided, however*, That the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this Act or otherwise."

* * *

"Sec. 8. The agreement to arbitrate—

* * *

"(k) Shall provide that the award of the board of arbitration and the evidence of the proceedings before the board relating thereto, when certified under the hands of at least a majority of the arbitrators, shall be filed in the clerk's office of the district court of the United States for the district wherein the controversy arose or the arbitration was entered into, which district shall be designated in the agreement; and, when

so filed, such award and proceedings shall constitute the full and complete record of the arbitration:

• • •

"Sec. 9. First. The award of a board of arbitration, having been acknowledged as herein provided, shall be filed in the clerk's office of the district court designated in the agreement to arbitrate.

"Second. An award acknowledged and filed as herein provided shall be conclusive on the parties as to the merits and facts of the controversy submitted to arbitration, and unless, within ten days after the filing of the award, a petition to impeach the award, on the grounds hereinafter set forth, shall be filed in the clerk's office of the court in which the award has been filed, the court shall enter judgment on the award, which judgment shall be final and conclusive on the parties.

"Third. Such petition for the impeachment or contesting of any award so filed shall be entertained by the court only on one or more of the following grounds:

"(a) That the award plainly does not conform to the substantive requirements laid down by this Act for such awards, or that the proceedings were not substantially in conformity with this Act;

"(b) That the award does not conform, nor confine itself, to the stipulation of the agreement to arbitrate; or

"(c) That a member of the board of arbitration rendering the award was guilty of fraud or corruption; or that a party to the arbitration practiced fraud or corruption which fraud or corruption affected the result of the arbitration: *Provided however*, That no court shall entertain any such petition on the ground that an award is invalid for uncertainty; in such case the proper remedy shall be a submission of such award to a reconvened board, or subcommittee thereof, for interpretation, as provided by this Act. *Provided fur-*

ther, That an award contested as herein provided shall be construed liberally by the court, with a view to favoring its validity, and that no award shall be set aside for trivial irregularity or clerical error, going only to form and not to substance.

"Fourth. If the court shall determine that a part of the award is invalid on some ground or grounds designated in this section as a ground of invalidity, but shall determine that a part of the award is valid, the court shall set aside the entire award: *Provided, however*, That, if the parties shall agree thereto, and if such valid and invalid parts are separable, the court shall set aside the invalid part, and order judgment to stand as to the valid part.

"Fifth. At the expiration of ten days from the decision of the district court upon the petition filed as aforesaid, final judgment shall be entered in accordance with said decision, unless during said ten days either party shall appeal therefrom to the circuit court of appeals. In such case only such portion of the record shall be transmitted to the appellate court as is necessary to the proper understanding and consideration of the questions of law presented by said petition and to be decided.

"Sixth. The determination of said district court of appeals upon said questions shall be final, and being certified by the clerk thereof to said district court, judgment pursuant thereto shall thereupon be entered by said district court.

"Seventh. If the petitioner's contentions are finally sustained, judgment shall be entered setting aside the award in whole or, if the parties so agree, in part; but in such case the parties may agree upon a judgment to be entered disposing of the subject matter of the controversy, which judgment when entered shall have the same force and effect as judgment entered upon an award."

TITLE II

"Section 201. All of the provisions of title I of this Act, except the provisions of section 3 thereof, are extended to and shall cover every common carrier by air engaged in interstate of foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.

"Sec. 202. The duties, requirements, penalties, benefits, and privileges prescribed and established by the provisions of title I of this Act, except section 3 thereof, shall apply to said carriers by air and their employees in the same manner and to the same extent as though such carriers and their employees were specifically included within the definition of 'carrier' and 'employee', respectively, in section 1 thereof."

* * *

Sec. 204. The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an agreement in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.

"It shall be the duty of every carrier and of its employees, acting through their representatives, se-

lected in accordance with the provisions of this title, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 3, title I, of this Act.

"Such boards of adjustment may be established by agreement between employees and carriers either on any individual carrier, or system, or group of carriers by air and any class or classes of its or their employees; or pending the establishment of a permanent National Board of Adjustment as hereinafter provided. Nothing in this Act shall prevent said carriers by air, or any class or classes of their employees, both acting through their representatives selected in accordance with provisions of this title, from mutually agreeing to the establishment of a National Board of Adjustment of temporary duration and of similarly limited jurisdiction."

The following provision of the Labor Management Relations Act of 1947, as amended (61 Stat. 136, 29 U.S.C. §§141-144, 171-188) is relevant:

"Sec. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

The general jurisdictional statutes involved are as follows:

28 U.S.C. §1331(a) (62 Stat. 930, amended 72 Stat. 415):

"The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of in-

terest and costs, and arises under the Constitution, laws, or treaties of the United States."

28 U.S.C. §1337 (62 Stat. 931):

"The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 61

INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, R. K. DOUD, S. V. CORNSTUBBLE, O. L. BROOM, C. R. CASEY, P. R. DAVIS, AND E. E. FUQUA,
Petitioners

vs.

CENTRAL AIRLINES, INC., *Respondent*

Respondent's Reply to Petition for Certiorari

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 656

INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, R. K. DOUD, S. V. CORNSTUBBLE, O. L. BROOM, C. R. CASEY, P. R. DAVIS, AND E. E. FUQUA, *Petitioners*

vs.

CENTRAL AIRLINES, INC., *Respondent*

Respondent's Reply to Petition for Certiorari

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Central Airlines, Inc., respondent herein, respectfully prays that the petition for certiorari be denied, and in support of such prayer presents the following:

STATEMENT OF THE CASE

The facts of this case, as stated in the opinion of the Circuit Court of Appeals for the Fifth Circuit (pages 1a-4a of appendix A in petitioner's application for certiorari), though brief, are essentially correct. The opinion of the Court below states that in April of 1958 Central discharged six of its employees, the individual petitioners herein, because they refused, while under suspension from the company, to attend a hearing at which they were denied the right to have

the union representative present. This was only one of the reasons for the discharge of these individual petitioners, and prominent among the other reasons for their discharge was the absolute refusal on the part of each of the six individual petitioners herein to perform overtime work in the respondent's maintenance shops in early April of 1958, when ordered to do so by the employer, Central Airlines. It was this refusal of these petitioners to work overtime, as ordered to do, and as required by the collective bargaining agreement between the union and respondent herein, that precipitated the so-called hearing or interview at which union representation was denied, for the reason that such representation was not contemplated by the collective bargaining agreement between the union and the respondent. It was only after the individual petitioners' refusal to work the overtime, and their subsequent refusal to discuss their reasons for so failing, with the company, that they were discharged.

QUESTION PRESENTED

The only question presented herein is whether or not petitioners' complaint in the United States District Court for the Northern District of Texas, Fort Worth Division, presents any matter which arises under the Constitution, laws, or treaties of the United States, or in other words presents a federal question which would confer jurisdiction on a District Court of the United States.

ARGUMENT ON THE MERITS

In affirming the dismissal by the Honorable District Court for the Northern District of Texas, Fort Worth Division, the Fifth Circuit Court of Appeals in its opinion stated:

> "The right asserted by the plaintiffs is a creature of contract, not a creature of a federal law."

This has been the contention of respondent herein ever since petitioners' complaint was filed in the District Court below, and to emphasize this contention and the holding of the Fifth Circuit Court of Appeals we refer this Honorable Court to the collective bargaining agreement between Central Airlines, Inc., and the petitioner International Association of Machinists, in an effort to at last convince all concerned that the relief sought by petitioners herein in their complaint involved only the interpretation of a private contract and not the interpretation or construction of any federal law.

It has been asserted that the disputes between the respondent Central Airlines and the individual petitioners herein involved a question of the individual employees-petitioners working overtime, and also involved the refusal of said employees-petitioners to attend an interview held by Central Airlines, when a union representative was not permitted to be present at such interview. That both of these disputes, the overtime and the union representative argument, involved the interpretation or construction of the bargaining agreement between the union and the re-

spondent company, can be readily seen by reference to certain paragraphs of said contract. It was the position of the union, at the outset of this dispute, that the company could not require overtime because overtime was not required or permitted by the contract. Without quoting it, Section 6 goes into considerable detail as to what rates of pay must be paid the employees when overtime is performed, and while this section does not specifically state that the employees shall be required to work overtime, no one could read this section without being certain that it meant, and was understood by all concerned, that overtime could be ordered by the company, and that when it was, certain rates of pay and certain other conditions must be followed. Section 6(i) specifically says:

> "When overtime work is required, the employees involved shall be given as much advance notice thereof as circumstances will permit."

Section 7 of the contract delineates the hours of service for the various employees, but it does not provide that overtime will not be worked.

Section 22 of the collective bargaining agreement clearly discusses the rights of the employer and employees with regard to the handling of complaints or disputes, and the investigation thereof and any discipline as a result thereof. This Section 22 provides, generally, that an employee shall not be disciplined or dismissed without notification in writing, that any employee who is so disciplined or dismissed shall be entitled to an investigation and hearing thereon if he makes written request therefor within seven days

after receiving such notice. Section 22 then continues to provide explicitly the various steps to be taken by any aggrieved employee who desires the investigation and hearing specified in this section. The matter, for instance, is first heard by the Maintenance Supervisor of the company, and if the employee is dissatisfied with the decision of the Maintenance Supervisor, he may appeal, following certain specified procedures, to the Chief Operating Officer of the company, and if still dissatisfied after the decision of the Chief Operating Officer, he may then appeal to the Central Airlines-I.A.M. Board of Adjustment established under the Railway Labor Act.

We mention these various sections contained in the bargaining agreement between the respondent and the union simply to emphasize respondent's contention that the disputes which precipitated the decision of the Neutral Referee and the System Board of Adjustment, and which then precipitated the filing of petitioner's complaint in the United States District Court for the enforcement of the Neutral's award, arise out of and involve only the interpretation, meaning or construction of the bargaining agreement, which is merely a private contract, and do not at all involve the construction of any federal law.

As the Court below stated, it is not enough that a federal law compelled the parties to enter into the contract. The mere fact that Section 184 of the Railway Labor Act (45 U.S.C., Secs. 151-163, 181-188) directed all airlines and airline unions to create system boards of adjustment for the solution and disposi-

tion of minor disputes, or disputes involving contracts between said parties, does not begin to establish any federal question. In this case, the respondent Central Airlines and the union, the I.A.M., by federal mandate contained in Section 184 of the Railway Labor Act, did establish the Central Airlines-I.A.M. Board of Adjustment for the disposition of minor disputes, which means disputes arising out of the operations of the business as contained in the collective bargaining agreement. The rights of the parties will be found in the collective bargaining agreement between the union and the company, and those rights are to be interpreted and enforced by the System Board of Adjustment. Handling or disposition of such disputes or complaints involves the construction of a contract, and not of the Railway Labor Act or any other federal statute. The grievances presented by the individual petitioners, which grievances precipitated the ruling of the Neutral Referee and the System Board of Adjustment, and subsequently the filing of petitioners' complaint to enforce the System Board Award, presented alleged violations of contract, not violations of the Railway Labor Act. Mr. Justice Cardozo, in *Gully vs. First National Bank in Meridian*, 1936, 229 U.S. 109, 57 S.Ct. 96, 81 L.Ed. 70, put the matter succinctly in the following language:

> "Federal jurisdiction may be invoked to vindicate a right or privilege claimed under a federal statute. It may not be invoked where the right asserted is non-federal, merely because the plaintiff's right to sue is derived from federal law, or because the property involved was obtained under federal statute. The federal nature of the

> right to be established is decisive. To bring a case within (28 U.S.C. 1331(a)), a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one of the plaintiff's cause of action."

All that can be said in the case now before this Honorable Court is that a federal law simply provided the impetus for the contract which created the System Board of Adjustment, which construed another private contract between the parties (the collective bargaining agreement).

The same question was presented in recent years to the Fifth Circuit Court of Appeals in the cases of *Amalgamated Association of Street, Electric Railway and Motor Coach Employees vs. Southern Bus Lines*, 5 Cir., 1951, 189 F.2d 219, and *Duplisea vs. Main Central Railroad*, 1 Cir., 1960, 260 F.2d 495. In the first cited case, the Fifth Circuit Court of Appeals stated:

> "Upon the allegations of the complaint, we think it clear that the court below did not have jurisdiction over this controversy. No facts are alleged upon which the conclusion can legitimately be based that the District Court independently of the arbitration agreement would have jurisdiction of the 'subject matter of a suit arising out of the controversy between the parties' as required by Section 4 of the Federal Arbitration Act, 9 U.S.C.A., Par. 4 . . . . Viewing the case at bar against this background of established principle, we do not find in it the elements of federal jurisdiction. What is here involved is merely a controversy between the parties as to the construc-

> tion of a contract which allegedly arises out of the laws of the United States respecting collective bargains between employer and employees in interstate commerce; but the right of action asserted does not arise out of those laws but only arises from the subsequent contractual relations of the parties. The wrongful breach of such relations does not confer federal court jurisdiction unless there is diverse citizenship."

In the *Duplisea* case, the First Circuit Court of Appeals, in considering the identical question, said this:

> "The complaint is conveniently vague as to the basis of federal jurisdiction . . . Nor is there any allegation of a breach of a duty imposed or the violation of a right given by the Constitution, the Railway Labor Act, or any other federal statute . . . . Nor does the complaint raise any question as to the validity, construction, or effect of the Constitution or of any law of the United States. On the contrary, under the terms of the complaint, plaintiff seeks damages for an alleged wrongful discharge in violation of the terms of a collective bargaining agreement negotiated by the Railroad and the Brotherhood of Railroad Trainmen under the provisions of the Railway Labor Act."

Petitioner's argument that Section 184 of the Railway Labor Act, which provides for the establishment of System Boards of Adjustment, should be construed so as to compel enforcement of arbitration in federal courts, is effectively answered by the Fifth Circuit Court of Appeals, not only in this case, but in the case of *National Airlines vs. Metcalf*, 5 Cir., 1959,

271 F.2d 817. In the *Metcalf* case, the Fifth Circuit Court of Appeals held that Section 153 of the Railway Labor Act, which specifically provides for enforcement of National Railroad Adjustment Board awards in the District Court of the United States, was specifically made not applicable to airlines, by Section 184 of the Railway Labor Act, and that therefore there is a vast difference between the enforcement provisions of the Act with respect to railroads and with respect to airlines. The Court in the *Metcalf* case quite correctly distinguished between awards of the National Railway Labor Adjustment Board and lower status awards of Airline System Boards, and held that the awards of an Airline System Board, unlike those of the National Railway Adjustment Board, carry "no legislative determination as to their finality or as to there being a basis of federal suit jurisdiction." The Court in the *Metcalf* case went on to state:

> "The legislative digest of Congress is clearly expressed. Such design is to grant to those winning arbitration awards the right to sue on them in federal courts only when and if the Mediation Board creates a National Air Transport Adjustment Board, whose award is ignored or not complied with by the carrier. Then only does Section 153(p) become operative in the air industry."

The Court of Appeals for the Fifth Circuit, in the *Central Airlines* case, said that on this point, to-wit, the question of whether or not Section 184 creates a federal right in the enforcement of an award:

> "We consider our decision in National Airlines

> vs. Metcalf, Fifth Circuit, 1959, 271 F.2d 817, controlling."

Hence, it is settled beyond any doubt that the Court of Appeals for the Fifth Circuit in the *Metcalf* case clearly and unequivocally decided that a system board of adjustment award could not be enforced in the federal courts, under the terms and provisions of Section 184 of the Railway Labor Act.

Petitioners' argument to the effect that if the right of enforcement of a system board of adjustment is not a question for the federal courts, enforcement of such awards would be difficult and perhaps impossible because of the "haphazard vagaries of state law," is effectively answered by the Court below when it points out that the "judicial approach in state courts after arbitration has already taken place has almost invariably shown a healthy respect for enforcement of an award." The Court further said:

> "These statutes vary greatly in their coverage and their procedural requirements and courts in different states vary greatly in the extent of the review which they gave to arbitration awards but, broadly speaking, state courts could be relied on to give effect to an arbitration award, in contrast with their unwillingness to enforce executory submission agreements. In the light of this historical context, it cannot be said that a federal law imposing a requirement of compulsory arbitration but not providing for federal court enforcement of the arbitration award is a half-way measure."

We submit that this statement by the Fifth Circuit

Court of Appeals is a very effective and accurate answer to this contention raised by petitioners. In other words, as stated by the Court of Appeals in the *Central Airlines* case, and in the *Metcalf* case, supra, as well as in *Sigfred vs. Pan American Airways*, 230 F.2d 13, state courts can, as they always have, enforce rights created by federal law, simply by applying federal law.

CONCLUSION

It is clear, we respectfully submit, that the only question here involved is a matter of interpretation of a private contract, and not of any federal law. This is clear from a reading of the petitioners' complaint, upon which the question of whether or not federal jurisdiction attaches must rest, and is clear also as a result of the many other cases herein cited. Before the federal courts have jurisdiction under Title 28 U.S.C.A., Sec. 1331, it must be clear that the matter to be submitted not only involves or concerns, but depends on the interpretation or construction of the Constitution, laws or treaties of the United States. Such is not the case here. We have simply a situation involving complaints made under, and rights dealt with in, a private contract, to-wit, the collective bargaining agreement between respondent and petitioner I.A.M. Respondent respectfully prays that petitioners' application for certiorari be in all things denied.

Respectfully submitted,

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No. 61

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, R. K. DOUD, S. V. CORNSTUBBLE, O. L. BROOM, C. R. CASEY, P. R. DAVIS, and E. E. FUQUA,

Petitioners,

v.

CENTRAL AIRLINES, INC.,

Respondent.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 61

INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, R. K. DOUD, S. V. CORNSTUBBLE, O. L. BROOM, C. R. CASEY, P. R. DAVIS, and E. E. FUQUA,

Petitioners,

v.

CENTRAL AIRLINES, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals, Judge John R. Brown dissenting, is reported at 295 F.2d 209 (R. 39-64). The District Court did not render an opinion (R. 37-38).

JURISDICTION

The judgment of the Court of Appeals was entered on October 13, 1961 (R. 65). The petition for a writ

of certiorari was granted on February 20, 1962 (R. 66). 369 U.S. 802. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether a suit to enforce an award of an airline system board of adjustment, created by requirement of the Railway Labor Act, presents a federal question that confers jurisdiction on a United States District Court.

STATUTES INVOLVED

The immediately pertinent statutory provision is section 204 of the Railway Labor Act (49 Stat. 1189, 45 U.S.C. § 184), and it provides in part that:

> The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, . . . shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.
>
> It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of this title, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of Section 3, Title I, of this Act.

Other provisions of the Railway Labor Act are set out in the Appendix (*infra*, pp. 59-66), as are section 301(a) of the Labor Management Relations Act, 1947 (61 Stat. 156, 29 U.S.C. § 185(a)) (*infra*, p. 66), and the general jurisdictional statutes, 28 U.S.C. § 1331(a), 62 Stat. 930, amended 72 Stat. 415, and 28 U.S.C. § 1337, 62 Stat. 931 (*infra*, p. 66).

STATEMENT

On March 14, 1957, pursuant to an election conducted by the National Mediation Board under the Railway Labor Act, petitioner International Association of Machinists (herein called the Union) was certified as the collective bargaining representative of the airline mechanics and stock and stores employees of respondent Central Airlines, Inc. (herein called the carrier) (R. 2, 28). On May 7, 1957, in accordance with the requirement of the Railway Labor Act, the Union and the carrier established a board of adjustment known as the Central-IAM System Board of Adjustment (R. 2, 28-29). The agreement to establish and maintain the board recites that it was entered into "In compliance with Section 204, Title II of the Railway Labor Act, as amended . . ." (R. 5).

The agreement defined the jurisdiction of the board (R. 5):

> The Board shall have jurisdiction over disputes between any employee covered by the Mechanics' Agreement and the Company, growing out of grievances or out of the interpretation or application of any of the terms of the Mechanics' Agreement. The jurisdiction of the Board shall not extend to proposed changes in hours of employment, rates of compensation, or working conditions covered by existing agreements between the parties hereto.

The board is composed of four members, two selected by the Union and two by the carrier (R. 5). Disputes not settled by the parties are referred to the board for determination (R. 5-6). If the board deadlocks, either the Union or the carrier may petition the National Mediation Board for appointment of a neutral to sit with the board as a member of it (R. 8). "Such Board of Adjustment, as then constituted, shall hear the parties with reference to the dispute pending before it, and a majority vote of the Board shall be final, binding, and conclusive between the Company and the Association and anyone they may represent having an interest in the dispute" (R. 8).

Section 22 of the collective bargaining agreement provides that "An employee who is disciplined or dismissed shall be entitled to an investigation and hearing thereon" upon timely written request, and "shall have the right to be represented by the employee of the Company of his choice or by his duly accredited representative or representatives" (R. 16). On April 3 and 4, 1958, six employees of the carrier declined to work overtime as requested (R. 11-12). As a result, on April 4 and 5, 1958, the carrier suspended the six employees pending its investigation of the matter, and instructed them to appear "for interview by the Company so that your statement can be considered by the Company in determining what if any action is to be taken in this connection" (R. 12-13). The carrier refused to permit a union representative to be present at the interview and the employees refused to submit to an interview in the absence of union representation (R. 13-14). On April 7, 1958, the carrier discharged the six employees (R. 1-2, 28), informing them that their decision "to refuse to talk to us . . . leaves us no

alternative except to terminate your services . . ." (R. 14).

The six employees filed grievances protesting their discharge (R. 14-15). No settlement having been reached, the dispute was submitted to the adjustment board (R. 3, 29). The board deadlocked (R. 3, 29). A neutral fifth member was appointed by the National Mediation Board (R. 3, 29). On November 3, 1959, after hearing, the neutral submitted an opinion and award, in which he was joined by the two members selected by the Union, sustaining the grievances (R. 3, 29, 10-26). The majority observed in part that (R. 25):

> It would be entirely destructive of the rights afforded the employees under Section 22 to say that the Company may discipline an employee, call the employee in for an interview on the subject matter forming the basis for the discipline and then say to him "You are not entitled to representation because this is not a hearing under Section 22 since you did not make a request for it." Regardless of the fact that the Company called the scheduled session of April 7, 1958 in Mr. Vaughan's office an "interview" it is quite clear that it was to be a hearing on the grievants' failure to perform work assignments as directed. As a matter of fact, Mr. Vaughan looked upon it as a hearing, as is evidenced by that part of his testimony quoted above. In effect what happened here was that the Company "jumped the gun" on the procedure set forth in Section 22(a). In doing so, it cannot be heard to say that the employees involved had no right to Union representation at the hearing. Manifestly, to hold otherwise in the circumstances of this case would render completely worthless the rights of the employee as set forth in Section 22(a)4.

> We can only conclude that the Company's refusal to allow the grievants the right of representation at the hearing scheduled for April 7, 1958 was in violation of Section 22 of the Collective Bargaining Agreement.

An award was entered directing the reinstatement of the six employees with full seniority and with compensation for any loss of pay (R. 26).

Alleging that the carrier refused to comply with the award (R. 3), the Union and the six employees brought an action against the carrier in the United States District Court for the Northern District of Texas to enforce the award (R. 1-4), predicating jurisdiction on 28 U.S.C. § 1331 in that the matter in controversy exceeds "the sum or value of $10,000, exclusive of interests and costs, and arises under the laws of the United States, specifically under the Railway Labor Act . . ." (R. 4). The District Court dismissed the action for want of jurisdiction, "for the reasons that there is no diversity of citizenship involved, and that further there is no federal question involving the Constitution, laws or treaties of the United States . . ." (R. 38). The Court of Appeals affirmed in a divided opinion (R. 39-64). The court stated that "federal law governs the scope of judicial review of an award made by a system board of adjustment under § 184 of the Railway Labor Act, since the application of state law to this question would allow a freedom of review incompatible with the purpose of the statute to allow the parties to arbitrate their disputes with finality" (R. 45, n. 7). It nevertheless concluded that a suit to enforce the award "is nothing more than a state-created action to construe a contract" (R. 59). On that basis it decided that federal question jurisdiction

did not exist under either 28 U.S.C. § 1331 or 28 U.S.C. § 1337 (R. 46-59).[1] In dissent, Judge Brown observed that "I am unable to comprehend how a contract compelled by federal law and to be interpreted by courts under federal law principles may realistically be characterized as a creation of the state, so that a suit to enforce it is not one 'arising under' federal law" (R. 61).

SUMMARY ARGUMENT

I.

The procedure for the adjustment of disputes prescribed by the agreement between the Union and the carrier, and the specific award rendered in conformity with that procedure requiring the reinstatement of six employees with back pay, are the product of positive duty imposed by federal statute. The Railway Labor Act makes it "the duty" of all carriers and the representatives of their employees "to exert every reasonable effort" to "maintain agreements" (title I, sec. 2, first, title II, sec. 201). To fulfill this duty further positive obligations are placed by the statute upon air carriers and the representatives of their employees in the adjustment of disputes growing out of grievances or out of interpretation or application of agreements concerning rates of pay, rules, and working conditions. These disputes "shall be handled in the usual manner" through the chief operating officer of the carrier, and "failing to reach an agreement in this manner, the dispute may be referred by petition of the parties or by either party to an appropriate adjustment board . . ." (RLA, title II, sec. 204). It is "the duty" of

[1] Accord, *ALPA* v. *Trans World Airlines*, 203 F. Supp. 438 (W.D. Mo.)

the carrier and the representative "to establish" an adjustment board to which an unresolved dispute may be referred (*ibid.*). The adjustment board to be created is one "for the purpose of adjusting and deciding disputes" between carriers and their employees "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions" (RLA, title II, sec. 204, title I, secs. 3, second, 3(i)). This adjustment procedure fulfills that part of the "purposes of the Act" designed "to provide for the prompt and orderly settlement of all disputes" of this class (RLA, title I, sec. 2(5)).

The Railway Labor Act thus mandates contractual creation of a settlement system centered upon the adjustment board as the sole forum through which to resolve disputes over grievances and the interpretation and application of the agreement. The federal command to establish and follow the procedure infuses every aspect of its functioning. From the establishment of an adjustment board through rendition of an award, any question concerning the process at every step is indivisibly governed by federal law. First, the statute alone furnishes the determinants by which to decide whether the duty to establish an adjustment board has been fulfilled and whether the jurisdiction vested by the contract in the adjustment board exceeds or is short of the statutorily required bounds. Second, the duty to establish an adjustment board provides the premise for the requirement that there can be no recourse to any tribunal other than the board to decide disputes within the board's competence. Third, the jurisdiction of the adjustment board is limited to "minor disputes" as distinguished from "major dis-

putes." A controversy concerning whether a particular dispute is within the competence of the board because it is "minor" or outside its competence because it is "major" is referable for solution exclusively to the statutory demarcation between major and minor disputes. Furthermore, although the dispute grows out of a grievance or the interpretation or application of an agreement and is therefore within the province of the board, there may be resistance to submission of the dispute to the board upon such a ground as the claim that it is so frivolous that there is no genuine dispute for the board to decide. The standard by which to decide such a controversy must be federally fashioned and its essence must be drawn from an evaluation and fulfillment of the purpose of Congress in requiring the establishment of an adjustment board. Fourth, federal law also controls at the final step of the procedure in determining the effect to be accorded to an award rendered by the adjustment board. The work of the board and therefore the object of Congress can be wrecked if the award does not enjoy a high degree of finality but is simply a facile prelude to further litigation. Accordingly, in a proceeding to enforce or set aside the award or on a collateral attack upon it, the standard for determining the efficacy of the award must be devised and applied in the light of the congressional purpose to provide for prompt and orderly settlement through the means of the adjustment board procedure. State law cannot substitute for a federal standard, for there is no assurance that state law has the quality essential to satisfying the federal purpose, and in any event the application of state law means the application of the variegated standards of fifty different sovereigns. The formulation and application of a standard for enforcement of an award

must therefore be a question of federal law because it is an integral adjunct of the effective functioning of the system that Congress has required be created.

The court below agrees. It observed that state arbitration "statutes varied greatly in their coverage and their procedural requirements and courts in different states varied greatly in the extent of the review which they gave to arbitration awards . . ." (R. 50). It reaffirmed the conclusion it reached in an earlier case that "federal law governs the scope of judicial review of an award made by a system board of adjustment under § 184 of the Railway Labor Act, since the application of state law to this question would allow a freedom of review incompatible with the purpose of the statute to allow the parties to arbitrate their disputes with finality" (R. 45, n. 7). And in that earlier case the court below stated that, "Congress having required the negotiation of collective bargaining agreements, and the establishment of boards of adjustment to interpret them, we deem it a reasonable corollary thereto that it intended that the scope of review in appeals from these boards should be determined by federal courts, applying federal law." *Sigfred* v. *Pan American World Airways*, 230 F.2d 13, 17 (C.A. 5). cert. denied, 351 U.S. 925.

II

This is an action to enforce an award issued by the adjustment board. Federal law controls its disposition. The standard applicable to test the validity of the award is federally fashioned and enforcement or vacation of the award depends upon the effect of the federal standard. There is no law but the federal law which is pertinent to the action. There is no other

law under which the action can arise. The existence of federal question jurisdiction therefore follows as a matter of course from the conclusion that federal law governs the enforcement of the award. For "it appears from the face of the complaint that determination of the suit depends upon a question of federal law." *Pan American Pet. Corp.* v. *Superior Court*, 366 U.S. 656, 663.

The true posture of decision by the court below is that, notwithstanding the dependence of the action on federal law, it is inferable from the air part of the Railway Labor Act that Congress nevertheless committed enforcement of the award to state courts and withheld jurisdiction from the federal courts absent diversity. The basis for the court's inference is that the specific provision in the Railway Labor Act for recourse to a federal district court to enforce an award issued by the National Air Transport Adjustment Board, in comparison with the absence of a like provision in the case of an award issued by the contractually established adjustment board, negatively implies that Congress barred access to a federal court absent diversity to enforce an award issued by the latter board. There is no tenable basis for this conclusion. Congress has established coequal methods of adjustment in providing for the creation of both a contractual board and the National Air Transport Adjustment Board. Each method possesses commensurate capacity for effective achievement of the congressional objective "to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules or working conditions." An award by either type of board has equal dignity. Since there is no

basis for invidious comparison between them, access to a federal district court to enforce an award issued by the National Air Transport Adjustment Board suggests equivalent access to enforce an award of the contractual board. Specific provision for recourse to a federal district court to enforce an award of the Air Transport Board, if it plausibly argues in favor of any differentiation, implies that the federal court is the *exclusive* forum for enforcement of an award rendered by that board. But it does not imply debarment from the federal court absent diversity to enforce an award rendered by the contractual board. The general statutory grants of federal question jurisdiction confer an incontrovertible basis for invoking the competence of the federal courts for this purpose. Silence or tenuous negative implication do not destroy this fountainhead of jurisdiction. Surely Congress did not in the 1936 enactment of the air part of the Railway Labor Act *pro tanto* repeal the statutory grant of federal question jurisdiction which has existed since 1875.

The court below agrees that "federal law governs the scope of judicial review of an award made by a system board of adjustment . . ." (R. 45, n. 7). It nevertheless states, in a patent self-contradiction, that a suit to enforce the award "is nothing more than a state-created action to construe a contract" (R. 59), and on the basis of this self-contradiction it denies the existence of federal question jurisdiction. This simply will not do. An action is created by the sovereign who prescribes the rules for its governance. Congress through the enactment of the air part of the Railway Labor Act prescribes the rules for the governance of an action to enforce an award of an adjustment board. State law does not enter into it. State law does not

require creation of the adjustment board; state law cannot forbid establishment of the adjustment board; state law cannot release the parties from obligatory recourse to the adjustment board; the adjustment board operates free of state law; and state law does not control the enforceability of the award. An action cannot be state-created if the governing rule in support of plaintiff's claim is federally prescribed.

ARGUMENT

28 U.S.C. § 1331(a) provides that "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interests and costs, and arises under the Constitution, laws or treaties of the United States." 28 U.S.C. § 1337 provides in part that "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce. . . ." The complaint alleges that the matter in controversy exceeds $10,000 and arises under the Railway Labor Act (R. 4). The crucial inquiry is therefore the same under either jurisdictional statute, namely, whether the action does arise under the Railway Labor Act. If it does, jurisdiction is properly founded on 28 U.S.C. § 1331, since the requisite amount is alleged, and on 28 U.S.C. § 1337, since the Railway Labor Act is a federal statute regulating commerce.

The Railway Labor Act divides into two parts. Title I pertains to rail transportation, title II to air transportation. The Railway Labor Act, originally confined to rail carriage, was amended on April 10, 1936 by the addition of the air part to it. 80 Cong. Rec. 5411. We shall show, first, that federal law created by

the air part of the Railway Labor Act controls the enforcement of an award issued by an adjustment board, and second, that the existence of federal question jurisdiction follows as a matter of course from the determination that federal law governs the enforcement of the award.

I. FEDERAL LAW CREATED BY THE AIR PART OF THE RAILWAY LABOR ACT REQUIRES THE ESTABLISHMENT OF AN ADJUSTMENT BOARD, AND GOVERNS EVERY ASPECT OF ITS FUNCTIONING, INCLUDING A PROCEEDING TO ENFORCE AN AWARD ISSUED BY IT.

A. An Outline of the Statutory Scheme; The Duty to Maintain Agreements Prescribed by It.

The procedure for the adjustment of disputes prescribed by the agreement between the Union and the carrier, and the specific award rendered in conformity with that procedure requiring the reinstatement of six employees with back pay, are the product of positive duty imposed by federal statute. Section 2, first, title I, of the Railway Labor Act, applicable to rail carriers and their employees and extended to air carriers and their employees by section 201, title II, makes it "the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and *maintain agreements* concerning rates of pay, rules, and working conditions, and *to settle all disputes, whether arising out of the application of such agreements* or otherwise . . ." (emphasis supplied). To fulfill the duty to exert every reasonable effort to maintain agreements, section 204, title II, of the Railway Labor Act, applicable exclusively to air carriers and their employees, provides in part that:

> The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of interpretation or application of agreements concerning rates of pay,

> rules, or working conditions, . . . shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an agreement in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.

The next paragraph of section 204 makes it the "duty" of the carrier and the employees' representative "to establish" an adjustment board to which an unresolved dispute may be referred:

> It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of this title, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 3, title I, of this Act.

Under the authority of section 3, title I, applicable to rail carriers and their employees, the carrier and the employees' representative may agree "to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section" (Sec. 3, second, title I). The disputes specified are "disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions" (Sec. 3(i), title I). The adjustment procedure fulfills that part of the "purposes of the Act" designed "to

provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions" (Sec. 2(5), title I).

The adjustment board, although set up by contract, is thus established pursuant to a statutory "duty to create it. . . . This gives it a public character that cannot be ignored." *Edwards* v. *Capital Airlines*, 176 F.2d 755, 760 (C.A.D.C.), cert. denied, 338 U.S. 885.[2] The statute mandates contractual creation of a settlement system centered upon the adjustment board as the sole forum through which to resolve disputes over grievances and the interpretation or application of the agreement. In this respect the policy expressed by the Railway Labor Act for air transportation is more forceful and affirmative than the policy expressed by the Labor Management Relations Act, 1947, for industry generally. Under the latter "Final adjustment by a method agreed upon by the parties is . . . declared to be the desirable method of settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement" (LMRA, title II, sec. 203(d)). But there is no duty to establish such a method. All that is required is that the employer and the union upon the request of either bargain in good faith upon the subject (LMRA, title I, secs. 8(a)(5), 8(b)(3), 8(d)). And they are free to agree upon self-help and conventional litiga-

[2] See also, *American Airlines* v. *ALPA*, 91 F. Supp. 629, 632 (E.D.N.Y.):

> "The authority or jurisdiction of the System Board is statutory . . . . It cannot be extended by agreement of the parties, for it is not a private board of arbitration."

tion, no less than upon a grievance procedure culminating in arbitration, as the means for resolving differences. *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195, 211-212; *Teamsters Local Union No. 795* v. *Yellow Transit Freight Lines*, 370 U.S. 711. Not so in air transportation under the Railway Labor Act. In this industry Congress has made the basic decision requiring recourse to the adjustment board, which the carrier and the union must create, as the means of settling grievances or disputes over the interpretation and application of the agreement. Congress imposed the duty to exert every reasonable effort to "maintain agreements"; it channelled fulfillment of this duty through a board established for the purpose of "adjusting and deciding" disputes over grievances and the interpretation and application of agreements; and by this means it sought to achieve its objective of "prompt and orderly settlement of all disputes" of this class.

The affirmative mandatory duty to maintain agreements imposed by the Railway Labor Act has been emphasized by this Court as the fundamental characteristic which distinguishes that statute from the Labor Management Relations Act, 1947. *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195. Concerning the Railway Labor Act, this Court observed that (*id.* at 211):

> [In *Brotherhood of R. Trainmen* v. *Chicago River & I. R. Co.*, 353 U.S. 30] we were dealing with a strike called by the union in defiance of an affirmative duty, imposed upon the union by the Railway Labor Act itself, compelling unions to settle disputes as to interpretation of an existing collective bargaining agreement, not by collective union pressures on the railroad but by submitting them to the Railroad Adjustment Board as the exclusive means of final determination of such "minor" dis-

> putes. * * * Indeed, the Court was able to conclude in *Chicago River* "that there was general understanding between both the supporters and the opponents of the 1934 amendment that the provisions dealing with the Adjustment Board were to be considered as compulsory arbitration in this limited field."

Concerning the Labor Management Relations Act, 1947, the Court observed in contradistinction that (*id.* at 211-212)

> Here, on the other hand, [in an action brought under section 301 of the Labor Management Relations Act, 1947], we are dealing with a suit under a quite different law which does not itself compel a particular, exclusive method for settling disputes nor impose any requirement, either upon unions or employers, or upon the courts, that is in any way inconsistent with a continuation of the Norris-LaGuardia Act's proscription of federal labor injunctions against strikes and peaceful picketing. * * * And certainly no one could contend that § 301 was intended to set up any such system of "compulsory arbitration" as the exclusive method for settling grievances under the Taft-Hartley Act.

While *Sinclair* adverted specifically to the rail rather than the air part of the Railway Labor Act, there is no difference between the two insofar as both mandate the duty to maintain agreements by requiring adherence to a prescribed procedure to adjust disputes as to interpretation or application of the agreement. *IAM* v. *Northwest Airlines*, 50 LRRM 2499, 2503 (C.A. 8, June 19, 1962).

The federal command imposed by the air part of the Railway Labor Act to create and follow the adjustment

procedure infuses every aspect of its functioning. From the establishment of an adjustment board through rendition of an award, any question concerning the process at every step is necessarily referable for its solution to the federal command: whether the carrier and the representative have discharged their statutory obligation to establish an adjustment board and whether the board which has been created comports with the statutory requirement;[3] whether the adjustment board may be bypassed in favor of another forum or mode;[4] whether a dispute is within the jurisdiction of the adjustment board, so as to require or permit its determination by the board, and the standard by which to decide the question;[5] whether an award issued by an adjustment board is conclusive or reviewable, and, if reviewable, the standard of review which is to apply.[6] These questions interlock. They are subsidiary to the statutory requirement that an adjust-

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[3] *Cf., UAW* v. *Delta Air Lines*, 83 F. Supp. 63 (N.D.Ga.).

[4] *Cf., Pan American World Airways, Inc.* v. *Division of Labor Law Enforcement*, 50 LRRM 2135 (D.C.N.D. Cal., March 28, 1962) (three-judge court); *Crusen* v. *United Air Lines*, 239 F. 2d 863 (C.A. 10), affirming, 141 F. Supp. 347 (D. Col.).

[5] *Cf., Flight Engineers* v. *American Airlines*, 50 LRRM 2453 (C.A.5, June 7, 1962); *IAM* v. *Northwest Airlines*, 50 LRRM 2499 (C.A. 8, June 19, 1962); *Pan American World Airways, Inc.* v. *ALPA*, 206 N.Y. Supp. 2d 98, 106-111, 22 Misc. 2d 148; *Griggs* v. *Transocean Airlines*, 176 Cal. App. 2d 843, 1 Cal. Rep. 803, 805-807.

[6] *Cf., Edwards* v. *Capital Airlines*, 176 F.2d 755 (C.A. D.C.), cert. denied, 338 U.S. 885; *Wooley* v. *Eastern Air Lines*, 250 F. 2d 86, 90-91 (C.A. 5); *Sigfred* v. *Pan American World Airways*, 230 F. 2d 13 (C.A. 5), cert. denied, 351 U.S. 925; *Bower* v. *Eastern Airlines*, 214 F.2d 623, 625-627 (C.A.3), cert. denied, 348 U.S. 871; *Farris* v. *Alaska Airlines*, 113 F. Supp. 907 (W.D. Wash.); *American Airlines* v. *ALPA*, 91 F. Supp. 629 (E.D.N.Y.).

ment board be created. The major premise for their determination flows from the purpose of Congress in requiring establishment of the board and ascertainment of the means essential to give efficacy to that purpose. These are federal questions governed by federal law, for the answers to them turn upon implementation of the federal command.

We turn now to a particularized consideration of each step in the creation and operation of the adjustment board to show that the whole of the process is indivisibly governed by federal law.

B. The Duty to Establish the Adjustment Board.

The duty to establish an adjustment board with specified jurisdiction can give rise to the question whether the duty has been fulfilled and whether the contract establishing the board has vested it with jurisdiction which exceeds or is short of the statutorily required bounds. The question is inherently federal in character. It is the statute which creates the duty and gives rise to the controversy as to whether the duty has been met. There is nothing but the statute to which to look in deciding the controversy.

C. The Requirement of Exclusive Recourse to the Adjustment Board.

The duty to establish an adjustment board provides the premise for the requirement that there can be no recourse to any tribunal other than the board to decide disputes within the board's competence. It would be almost pointless to compel the parties to create a board but to leave them free to disregard it and resort to court. Under the rail part of the Railway Labor Act Congress has created the National Railroad Adjust-

ment Board with jurisdiction to decide the identical class of disputes which under the air part of the Act Congress has committed to the adjustment board contractually established pursuant to statutory duty. The jurisdiction of the NRAB is exclusive, precluding resort to any court, the purpose being to assure expertness and uniformity in the interpretation and application of the collective bargaining agreement and to prevent diffusion of disputes into a multiplicity of tribunals.[7] This conclusion was drawn from the purpose

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[7] *Pennsylvania R. Co.* v. *Day*, 360 U.S. 548; *Slocum* v. *Del., L. & W. RR. Co.*, 339 U.S. 239; *Order of Railway Conductors* v. *Southern Ry. Co.*, 339 U.S. 255; *Order of Railway Conductors* v. *Pitney*, 326 U.S. 561. A union may be enjoined from striking over matters pending before the NRAB (*Brotherhood of Railroad Trainmen* v. *Chicago River & Ind. RR. Co.*, 353 U.S. 30; *cf.*, *Manion* v. *Kansas City Term. Trans. Co.*, 353 U.S. 927), and the injunction may be conditioned upon a carrier's maintenance of the status quo pending decision by the NRAB. *Brotherhood of Locomotive Engineers* v. *M.-K.-T. RR. Co.*, 363 U.S. 528. See also, as to the air part of the Railway Labor Act, *IAM* v. *Northwest Airlines*, 50 LRRM 2499 (C.A.8, June 19, 1962).

Under the rail part (*Moore* v. *Illinois Cent. R. Co.*, 312 U.S. 630), as under the air part (*Transcontinental & Western Air* v. *Koppal*, 345 U.S. 653), a discharged employee may accept his severance pay from employment as final and sue in court to recover damages for wrongful discharge in breach of contract, his action being then controlled by state law. This is a narrow exception scrupulously confined to an action for wrongful discharge in which the employee accepts the termination of his employment. *Pennsylvania R. Co.* v. *Day*, 360 U.S. 548, 553-554; *Slocum* v. *Del., L. & W. RR. Co.*, 339 U.S. 239, 244-245; *Union Pacific RR. Co.* v. *Price*, 360 U. S. 601, 609, n. 8; Summers, *Individual Rights In Collective Agreements and Arbitration*, 37 N.Y.U.L. Rev. 362, 386-387 and n. 114. The exception is of course not applicable in this case.

Mention should be made of the question reserved by this Court in *Brotherhood of Locomotive Engineers* v. *M.-K.-T. RR. Co.*, 363 U.S. 528, 531, n. 3, "whether a federal court can, during the pendency of a dispute before the Board, enjoin a carrier from effectuating the changes which gave rise to and constitute the subject matter of the dispute, independently of any suit by the railroad for equitable relief." Finally, there is the situation where a particular action may be both a violation of an agreement, and

of Congress in creating the NRAB. The identical conclusion is required by the identical purpose of Congress in commanding the creation of an adjustment board.[8] The purpose behind each is "to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions" (RLA, sec. 2(5), title I). Canalizing these disputes exclusively through the procedure ordained by Congress is essential to fulfillment of the purpose. And it is federal law alone which fashions the conclusion.

D. The Determination Whether a Dispute Is Within the Jurisdiction of the Adjustment Board.

The requirement of exclusive recourse to the adjustment board to resolve disputes falling within its jurisdiction does not dispense with the question whether a particular dispute is within or without the competence of the board. The adjustment board's jurisdiction is confined to disputes "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions." Other disputes fall within the jurisdiction of the National Mediation Board, namely: "(a) A dispute con-

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therefore within the competence of an adjustment board under that rubric, and a violation of a duty imposed by the Railroad Labor Act, and hence within direct judicial cognizance under that heading.

[8] *Pan American World Airways, Inc.*, v. *Division of Labor Law Enforcement*, 50 LRRM 2135 (D.C.N.D. Cal., March 28, 1962) (three-judge court). Under section 3, second, title I, of the Railway Labor Act, authorizing rail carriers and representatives to agree to the establishment of a system, group, or regional board of adjustment as an alternative to proceeding before the National Railroad Adjustment Board, the adjustment board established by agreement has exclusive jurisdiction. *Atlantic Coast Line RR. Co.* v. *Pope*, 119 F. 2d 39, 43 (C.A. 4); *Primakow* v. *Railway Express Agency*, 56 F. Supp. 413, 415 (E.D. Wis.).

cerning *changes* in rates of pay, rules, or working conditions not adjusted by the parties in conference. (b) Any other dispute *not referable to an adjustment board*, . . . and not adjusted in conference between the parties, or where conferences are refused." RLA, title II, sec. 203 (emphasis supplied). The air part of the Railway Labor Act thus carries over the distinction between "major disputes" and "minor disputes" which prevails under the rail part of the Act. *Cf., Elgin, J. & E. Ry. Co.* v. *Burley*, 325 U.S. 711, 722-728; *O'Donnell* v. *Pan American World Airways*, 200 F.2d 929 (C.A. 2). The authority of the adjustment board is limited to the so-called minor dispute. Were a carrier or a representative to refer a dispute to the adjustment board, the other party might resist submission of the dispute upon the ground that it is not a minor dispute within the competence of the board, and the question could be brought to a head in a judicial proceeding to compel the reluctant party to submit the dispute to the board for determination. The question then to be decided by the court is exclusively federal in character. It pertains entirely to the statutory demarcation between major and minor disputes. The statute furnishes the standard for decision.

Resistance to submission of a dispute to the adjustment board can also arise where, though the dispute grows out of a grievance or the interpretation or application of an agreement and is therefore within the province of the board, it is urged that the claim is so frivolous that there is no genuine dispute for the board to decide.[9] This was the situation before this Court in *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, dealing with a conventional contractual provision for the arbitration of grievances over interpretation

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[9] *Cf., Griggs* v. *Transocean Airlines*, 176 Cal. App. 2d 843, 1 Cal. Rep. 803, 806-807.

or application of the agreement in an industry covered by the Labor Management Relations Act, 1947. This Court held that "the agreement is to submit all grievances to arbitration, not merely those that a court may deem to be meritorious"; it is enough that "the party seeking arbitration is making a claim which on its face is governed by the contract"; "frivolous claims" no less than those thought to be "meritorious" are to be arbitrated. *Id.* at 567-568. The premise for the adoption of this standard was the policy expressed in section 203(d) of the Labor Management Relations Act, 1947: "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. . . ." "That policy can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play." *Id. at* 566. See also, *Drake Bakeries* v. *Local 50, American Bakery Workers,* 370 U.S. 254, 263.

Whether the same standard should be adopted for the air part of the Railway Labor Act is exclusively a federal question. What the standard should be turns on evaluating and fulfilling the purpose of Congress in requiring the establishment of an adjustment board. Since compulsory creation and recourse to the adjustment board under the air part of the Railway Labor Act expresses an even more positive policy than inheres in the cognate principle underlying the Labor Management Relations Act, 1947 (*supra,* pp. 16-18), it follows *a fortiori* that submission of disputes to the adjustment board is obligatory regardless of the deemed frivolity of the claim. But if a different standard were adopted, it would only be because the difference is responsive to a distinctive attribute of the fed-

eral command to create an adjustment board. In either event it would be federal law, not state law, which fashions the standard. For example, state law permitting either party at will to revoke an executory agreement to arbitrate could not be interposed to permit a carrier or a representative to withhold a dispute from the adjustment board. The clash with the federal command would be too resounding not to be heard.[10] The sound of the clash would be softer but still unmistakable were the state standard to require a judicial prehearing of every dispute as a condition precedent to its submission to the adjustment board whenever the carrier or the representative chooses to contest its substantiality. And the vice would be compounded by a multiplicity of standards were each of the fifty states free to devise its own rule.[11] To safe-

[10] The court below states that in this case "jurisdiction lies with the state courts of Tarrant County, Texas" (R. 59). Texas follows the common law rule that an agreement to submit disputes to arbitration is revocable until an award is rendered. *Tejas Development Co.* v. *McGough Bros.*, 165 F. 2d 276 (C.A. 5) (applying Texas law). Nevertheless, the court below does not suggest that Texas law can free the carrier or the representative from obligatory recourse to the adjustment board as required by federal law. On the contrary, it declares that "State courts would be required to recognize the validity of arbitration agreements established under the federal law" (R. 48, n. 12).

[11] *Cf.*, 2 Beale, Conflict of Laws, §347.5, pp. 1245-1247 (1935):

> "American courts, without exception, hold that arbitration agreements pertain to remedy or procedure. Consequently, the law of the forum determines their enforceability regardless of the place where the contract containing an arbitration provision was made, or was to be performed, or the law intended by the parties to govern. * * * The American doctrine leads to confusion and uncertainty in the result of an arbitration provision. This is obviously contrary to the purpose of such agreements and the desires of business. It has resulted in a mad race for jurisdiction when an arbitration provision is sought to be enforced."

guard the integrity of the adjustment procedure Congress has ordained, there must be one rule; it must be federally fashioned; and it must draw its content from the need to give efficacy to the congressional scheme.

E. The Enforcement of An Award Rendered by the Adjustment Board.

Federal law also controls at the final step of the procedure that Congress has required be created. The effect to be accorded to an award rendered by the adjustment board, in a proceeding to enforce or set it aside or on a collateral attack upon it, can spell the difference between a useless or an efficaceous system. The "whole point of arbitration is lost if the winning party has to go to court to enforce the award and the judge requires the virtual relitigation of all the issues involved."[12] As this Court stated in fashioning the standard to prevail in an action under section 301(a) of the Labor Management Relations Act, 1947: "The refusal to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards." *United Steelworkers* v. *Enterprise Wheel and Car Corp.*, 363 U.S. 593, 596.[13] At the same time this Court

[12] Gregory and Orlikoff, *The Enforcement of Labor Arbitration Agreements*, 17 U. Chi. L. Rev. 233, 238 (1950). See also, *id.* at 263.

[13] Discussing the finality to be accorded an award rendered by the NRAB under the rail part of the Railway Labor Act, this Court stated: "Plainly the statutory scheme as revised by the 1934 amendments was designed for effective and final decision of grievances which arise daily, principally as matters of the administration and application of the provisions of collective bargaining agreements. This grist of labor relations is such that the statutory

indicated a limitation upon the finality of an award (*id.* at 597):

> Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look to guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

Devising, refining and applying a standard which marks the line between plenary review and utter finality is a question of federal law under the air part of the Railway Labor Act no less than under section 301(a) of the Labor Management Relations Act, 1947. The agreement in this case provides that "a majority vote of the Board shall be final, binding, and conclusive . . ." (R. 8). The effect to be given to this compact must be drawn from the purpose of Congress in requiring creation of the board. The desideratum is provision "for the prompt and orderly settlement of all disputes growing out of grievances, or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." The work of the board and therefore the object of Congress can be wrecked if the award does not enjoy a high degree of finality but is simply a prelude to further litigation. There is then no promptness or order. The standard for testing the validity of an award must therefore draw its essence from the congressional purpose to

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scheme cannot realistically be squared with the contention that Congress did not purpose to foreclose litigation in the courts over grievances submitted to and disposed of by the Board . . . " *Union Pacific RR. Co.* v. *Price*, 360 U.S. 601, 616.

provide for prompt and orderly settlement through the means of the adjustment board procedure. This is the major premise which governs the whole.

State law or a distilled essence of it, although it may furnish clues to its formulation, cannot substitute for a federal standard. State law runs the gamut from virtual *de novo* review to virtual nonreview.[14] All would agree that an award requires vacation if it is infected with fraud, corruption, or gross procedural unfairness.[15] Few would disagree that an award "cannot be set aside for mere errors of judgment, either as to the law or as to the facts."[16] But the vexing question is ascertainment of the level at which "mere errors" are elevated to fundamental prejudicial defects. There is a vast range of choice in stating and applying a standard by which to test the validity of an award: whether it is "founded on such a basic mistake of fact that it clearly fails to express the judgment of the arbitrators";[17] whether it is in "manifest disregard" of the law;[18] whether it is so foreign to the tenor of the agree-

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[14] Note, *Judicial Review Of Arbitration Awards On the Merits*, 63 Harv. L. Rev. 681 (1950).

[15] *Cf.*, *Frazier* v. *Ford Motor Co.*, 364 Mich. 648, 112 N. W. 2d 80.

[16] *Wilkens* v. *Allen*, 169 N.Y. 494, 496, 62 N.E. 575, 576. See also, *Burchell* v. *Marsh*, 17 How. 344, 349; *Morceau* v. *Gould-National Batteries*, 50 LRRM 2046 (Mass., April 9, 1962).

[17] 6 Williston, Contracts, §1929A, pp. 5399-5400 (rev. ed. 1938); see also, Sturges, Commercial Arbitration and Awards, 787-793 (1930).

[18] *Wilko* v. *Swan*, 346 U. S. 427, 436-437; see also, *United States* v. *Farragut*, 89 U.S. 406, 420 ("manifest mistake of law"); *Evans* v. *Hudson Coal Co.*, 165 F.2d 970, 974 (C.A. 3) (an award must be "in accordance with the provisions of the Fair Labor Standards Act or any other applicable statute"); Sturges, Commercial Arbitration and Awards, 793-798 (1930).

ment it purports to interpret that it is in excess of the power conferred on the arbitrators;[19] whether it is against public policy.[20] The adoption of all, some, or none of these formulations depends upon their fitness to promote the purpose of Congress in requiring the establishment of the adjustment board procedure. "Since arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement" (*United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 578), it is necessary in drawing on precedent from commercial arbitration to keep a cautious eye trained on the difference. And a standard impeccable on its face requires perceptive

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[19] *Western Union Tel. Co.* v. *A.C.A.*, 299 N.Y. 177, 86 N.E. 2d 162, criticized in Note, 63 Harv. L. Rev. 347 (1949); *Black* v. *Cutter Laboratories*, 43 Cal. 2d 788, 278 P.2d 905, aff'd., 351 U.S. 292, criticized in Note, 68 Harv. L. Rev. 1285 (1955); *National Cash Register Co.* v. *Wilson*, 8 N.Y. 2d 377, 171 N.E. 2d 302, 305 (Arbitrators may be said to have exceeded their powers "only if they gave a completely irrational construction to the provisions in dispute and, in effect, made a new contract for the parties."); *Marceron* v. *Chevy Chase Services, Inc.*, 258 F. 2d 155, 158-159 (C.A.D.C.).

[20] In addition to the first two cases cited in the preceding note, see also, *Glendale Mfg. Co.* v. *Local No. 520, I.L.G.W.U.*, 283 F. 2d 936 (C.A. 4), cert. denied, 366 U.S. 949; *Minkoff* v. *Scranton Frocks, Inc.*, 181 F. Supp. 542, 547 (S.D.N.Y.), aff'd., 279 F. 2d 115 (C.A. 2) ("It seems clear that a federal court should not confirm an award which orders an act to be done contrary to federal law."); *Local 453, I. U. E.* v. *Otis Elevator Co.*, 201 F. Supp. 213 (S.D.N.Y.), and *s.c.* 50 LRRM 2689 (S.D.N.Y., July 9, 1962); *Avco Corp.* v. *Prete* [illegible], 22 Conn. Supp. 475, 174 A. 2d 684. *Cf.*, *Carey* v. *General Electric Co.*, 45 CCH Lab. Cas. ¶ 17,599, pp. 26,692-93 (D.C.S.D.N.Y., April 19, 1962), refusing to order arbitration of an "unlawful claim," and *Duralite Co.* v. *Local 485, IUE*, 50 LRRM 2557 (E.D.N.Y., June 22, 1962), refusing to order arbitration under an agreement set aside by the NLRB.

application to realize its object. Expansive judicial oversight under the guise of determining whether the adjustment board has acted within its power or in keeping with public policy can become an open sluice through which to drain the efficacy of the system by depriving it of the finality which is one of its foremost values. The formulation and application of a standard for the enforcement of an award must therefore be a question of federal law because it is an integral adjunct of the effective functioning of the system that Congress has required be created.

The point is illustrated by the defense respondent interposed to resist the award as "void and unenforceable" (R. 30). Respondent charged that the adjustment board acted without "jurisdiction or authority" and that its award was in excess of its "jurisdiction and authority" (R. 30). Respondent personalized its attack upon the board, stating that it did not exercise an "honest judgment," its actions constituted "legal fraud," and its award is based on "partiality" and "misconduct" (R. 30-31). On a different level, respondent stated that the award is infected with "gross error," "palpable gross error," and is "arbitrary and capricious" (R. 30-31). Insofar as this compendium of conclusory allegations was particularized at all, respondent's attack upon the award seems to reduce to four matters: (1) the adjustment board erroneously concluded that the steps precedent to reference to the board had been followed (R. 30, *cf.* the board's opinion, R. 18-22); (2) the board did not consider the evidence favorable to respondent (R. 30); (3) the award is not supported by substantial evidence (R. 30); (4) the board did not decide certain issues deemed by respond-

ent (but not by the board) to be relevant to the disposition of the controversy (R. 31, *cf.* the board's opinion, R. 25-26). At the forefront of judicial consideration of these claims is the standard to be applied in dealing with them. For example, to what degree, if at all, is an unparticularized conclusory allegation of error to stand in the way of summary judgment? To what degree, if at all, is a claim of evidentiary error to be considered? And the judicial approach is important, not only in ascertaining the applicable standard, but also in the quickness and incisiveness with which the disposition is made. For the salutariness of even an enforced award can be undercut by delay resulting from a protracted and leisurely proceeding. Federal standards are therefore indispensable to protect the efficacy of the federal scheme.

There is yet another reason for control by federal law. Application of state law means the application of the variegated standards of fifty different sovereigns. Major collective bargaining agreements are customarily multistate in coverage. The operations of an air carrier are interstate almost by definition.[21] An agreement with an air carrier is inevitably of the kind that covers employment "in a great number of jurisdictions, spread over the length and breadth of the United States. Under a 'master contract' negotiated in Chicago, a grievance may arise in Utah and, perhaps, be arbitrated in a third state. This would present almost insuperable problems of enforcement in the present context of widely varying judicial attitudes

[21] Respondent serves the six-state area of Arkansas, Colorado, Missouri, Oklahoma, Kansas and Texas.

and the complex set of conflicts-of-law rules in which the subject is enveloped." [22]

Thus the law of at least three jurisdictions is potentially applicable to a single award rendered under a unitary collective bargaining agreement. "An award valid according to the law of the place where it was rendered and legal by the place where it is to be performed may be enforced elsewhere under the rules of comity . . . , unless such enforcement should prove contrary to the public policy of the lex fori . . . , or unless a remedy is called for which is not available under the lex fori . . . . " [23] The complicating difficulties which ensue are illustrated by the opinion in *Moyer* v. *Van-Dye-Way Corp.*, 126 F. 2d 339 (C.A. 3). The employer was a New Jersey corporation; the union represented Pennsylvania citizens; the agreement to arbitrate was made in New York, where the hearing was held and the award rendered; a diversity suit to enforce the award was brought in the United States District Court for the Eastern District of Pennsylvania. In concluding that New York law governed, the Court of Appeals for the Third Circuit stated that (*id.* at 340-341):

> . . . it is clear that in such a suit as this, involving legal effects of events which have occurred in other

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[22] Gregory and Orlikoff, *The Enforcement of Labor Arbitration Agreements*, 17 U. Chi. L. Rev. 233, 257 (1950). Indeed, as Judge Brown noted in dissent (R. 63, n. 36):

> "The selection of the state is only the beginning. What local law of the local state applies? For example, in Texas is it the Arbitration Act, TEX. CIV. STAT. arts. 224-238 (Vernon 1939), or the special one covering labor controversies in arts. 239-249, or the case-made law? See 6 Tex. Jur. 2d Arbitration and Award §§54-57 (1959)."

[23] Anno., *Extraterritorial Enforcement of Arbitral Award*, 73 A.L.R. 1460.

> states, and where the jurisdiction of a federal court is based on diversity of citizenship, it is the duty of the court to apply the conflict of laws rule of the state in which suit is brought. * * * That a suit may be brought in Pennsylvania upon a foreign arbitration award is clear from a recent decision. * * * No Pennsylvania authority found, however, enunciates a rule of reference to the law by which the validity of the award is to be determined. In the absence of exact precedent other available data is to be considered. * * *
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> Pennsylvania courts have treated an award as comparable to a judgment, and not subject to collateral attack. * * * Validity of a judgment is determined by the law of the state where rendered. * * * The general authority is to the effect that the validity of an arbitration award is determined by the law of the place of its rendition. * * * We conclude that by the Pennsylvania rule of conflict of laws, the validity of the award in this case is a question of New York law.

Yet the nexus between the controversy and the place where the award is rendered can be, and often is, insignificant and fortuitous.[24]

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[24] For example, an agreement covering a plant in West Virginia may be made and performed in that state. Arbitrators to hear grievances at that plant may be drawn from Richmond, Philadelphia, Boston, St. Louis, Chicago, and Washington, D. C. The arbitrator arrives at the plant, conducts the hearing, and returns home from whence he renders his award. The place where he resides, which is the place that the award is rendered, has only an accidental connection with the grievance. This is a typical situation.

Also typical is an agreement negotiated and executed in one state, between a union headquartered in a second state and an employer chartered in a third state and having its home office in a fourth state, covering operations which are nationwide or sectional. A grievance may arise in a fifth state, be heard in a sixth state, and the award rendered in a seventh state deciding a disputed question of contract interpretation and application to apply in every state of the multistate operations covered by the agreement.

"It is readily apparent that state regulation of the labor-management agreement to arbitrate not only brings about the usual irregularities of interpretation and application (the same collective agreement means different things in different states), but places the element of enforcibility literally beyond the control of the parties. Either party can frustrate the agreement with a fair degree of ease. If any sort of reliability is to be injected into the field of labor arbitration, some degree of uniformity or control must be achieved."[25] Congress achieved the requisite uniformity and control in the enactment of the air part of the Railway Labor Act. Air commerce is inherently interstate in scope, and when Congress undertook to regulate the labor relations of air carriers, it necessarily adopted a single national rule essential to the character of the industry and to accomplishment of the regulatory purpose. The air part of the Railway Labor Act is therefore the kind of statute "in reference to which it is not only proper, but necessary for us to assume, 'in the absence of a plain indication to the contrary, that Congress . . . is not making the application of the federal act dependent on state law.' *Jerome* v. *United States*, 318 U.S. 101, 104. Nothing in the statute's background, history, terms or purposes indicates its scope is to be limited by . . . varying local conceptions, either statutory or judicial, or that it is to be administered in accordance with whatever different standards the respective states may see fit to adopt for the disposition of unrelated local problems." *N.L.R.B.* v. *Hearst Publications*, 322 U.S. 111, 123.

The court below agrees. It observed that state arbitration "statutes varied greatly in their coverage and

[25] Gregory and Orlikoff, *The Enforcement of Labor Arbitration Agreements*, 17 U. Chi. L. Rev. 233, 259 (1950).

their procedural requirements and courts in different states varied greatly in the extent of the review which they gave to arbitration awards . . . " (R. 50). It reaffirmed the conclusion it reached in an earlier case that "federal law governs the scope of judicial review of an award made by a system board of adjustment under §184 of the Railway Labor Act, since the application of state law to this question would allow a freedom of review incompatible with the purpose of the statute to allow the parties to arbitrate their disputes with finality" (R. 45, n. 7). And in that earlier case the court below stated that, "Congress having required the negotiation of collective bargaining agreements, and the establishment of boards of adjustment to interpret them, we deem it a reasonable corollary thereto that it intended that the scope of review in appeals from these boards should be determined by federal courts, applying federal law." *Sigfred* v. *Pan American World Airways*, 230 F. 2d 13, 17 (C.A. 5), cert. denied, 351 U.S. 925.

II. THE EXISTENCE OF FEDERAL QUESTION JURISDICTION FOLLOWS AS A MATTER OF COURSE FROM THE DETERMINATION THAT FEDERAL LAW GOVERNS THE ENFORCEMENT OF AN AWARD ISSUED BY AN ADJUSTMENT BOARD.

A. Federal Question Jurisdiction to Enforce the Award Exists.

This is an action to enforce an award issued by the adjustment board. Federal law controls its disposition. The standard applicable to test the validity of the award is federally fashioned and enforcement or vacation of the award depends upon the effect of the federal standard. There is no law but the federal law which is pertinent to the action. There is no other law under which the action can arise. The existence of federal question jurisdiction therefore follows as a matter of course from the conclusion that federal law governs

the enforcement of the award. For "it appears from the face of the complaint that determination of the suit depends upon a question of federal law." *Pan American Pet. Corp.* v. *Superior Court,* 366 U.S. 656, 663.

Any doubt is put to rest upon consideration of the decision in *Textile Workers Union* v. *Lincoln Mills,* 353 U.S. 448. Article III, section 2, of the Constitution provides in part that the "judicial power of the United States shall extend to all cases, in Law and Equity, arising under . . . the Laws of the United States . . . " Section 301(a) of the Labor-Management Relations Act, 1947, provides in part that, without regard to amount or diversity, "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States . . . . " The constitutionality of this investiture of jurisdiction in the federal district courts depends on whether an action founded on section 301(a) is a case which "arises under . . . the Laws of the United States . . . . " This Court held that section 301(a) "authorizes federal courts to fashion a body of federal law for enforcement of these collective bargaining agreements" (353 U.S. at 451), and on that basis concluded in a single sentence that a "case or controversy arising under §301(a) is, therefore, one within the purview of judicial power as defined in Article 3" (*id.* at 457). In the present case, since enforcement of an award issued by an adjustment board is similarly governed by federal law, an action to compel compliance with the award is indistinguishably one "arising under" the laws of the United States. To be sure, *Lincoln Mills* was concerned with constitutionality,

and the constitutional grant of federal question jurisdiction has broader reach than the identically worded statutory grant.[26] But there is no difference between the two in the area of application common to this case and to *Lincoln Mills*. For the minimum reach of both the constitutional and statutory grant embraces an action brought by plaintiff in which the governing rule in support of his claim is federally prescribed. This is made clear by Mr. Justice Frankfurter in dissent in *Lincoln Mills*. He departs from the majority, not in the result which should be reached given the view that section 301(a) mandates fashioning substantive federal law, but only because he disagrees with that interpretation, believing instead that section 301 (a) merely provides a federal forum for the enforcement of a right created by state law and that investiture of this sort of "protective jurisdiction" is unconstitutional in that it extends federal judicial power beyond cases "arising under" federal law. However, in words fully applicable to demonstrate the existence of federal question jurisdiction in this case, Mr. Justice Frankfurter succintly summarized the scope of the statutory grant in that area of its application about which no doubt exists either as a question of statutory reach or constitutional power (*id.* at 470):

> Almost without exception, decisions under the general statutory grants have tested jurisdiction in terms of the presence, as an integral part of plaintiff's cause of action, of an issue calling for interpretation or application of federal law. *E. g.*, *Gully* v. *First Nat. Bank*, 299 U.S. 109. Although

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[26] *Gully* v. *First National Bank*, 299 U.S. 109, 113-114; Hart & Wechsler, The Federal Courts and the Federal System, 749-752 (1953); Mishkin, *The Federal "Question" In The District Courts*, 53 Col. L. Rev. 157, 160-163 (1953); 1 Moore's Federal Practice 606-607, 629-630 (1961).

> it has sometimes been suggested that the "cause of action" must derive from federal law, see *American Well Works Co.* v. *Layne & B. Co.*, 241 U.S. 257, 260, it has been found sufficient that some aspect of federal law is essential to plaintiff's success. *Smith* v. *Kansas City Title & T. Co.*, 255 U.S. 180. The litigation-provoking problem has been the degree to which federal law must be in the forefront of the case and not collateral, peripheral or remote.

When, as here, federal law governs the enforcement of an award, an action to compel compliance with the award calls for "interpretation or application of federal law" "as an integral part of plaintiff's cause of action"; an "aspect of federal law is essential to plaintiff's success"; and "federal law" is so far "in the forefront of the case" that it is impossible to advance it more prominently.

The import of *Lincoln Mills* aside, federal question jurisdiction exists in this case measured by the least expansive view of the scope of the statutory grant. Federal law is at the heart of the action to enforce the award. The right to enforcement is drawn from and determined by federal law. It is a "federal right implied from the statute and the policy which it has adopted."[27] Resistance to enforcement brings about a controversy over a federal right. Controversies "concerning rights which are created by the Constitution or laws of the United States . . . are in their essence federal. . . ." *Swafford* v. *Templeton*, 185 U.S. 487, 494. "Whenever federal law grants a right of property or of action, and a suit is brought to enforce that right, such a suit arises under the law creating the right,

[27] *Tunstall* v. *Brotherhood of Locomotive Firemen*, 323 U.S. 210, 213.

within the meaning of statutes defining the jurisdiction of federal courts." *McGinnis v. Northern Pacific Ry. Co.*, 204 Fed. 998, 1001 (D.N.D.), approved in *Peyton v. Railway Express Agency*, 316 U.S. 350, 352-353; see also, A. Hand, J., in *Wells Fargo & Co. v. Cuneo*, 241 Fed. 726, 727 (S.D.N.Y.). A plaintiff who grounds his claim in federal law necessarily "makes the determination and declaration of the law of the United States governing the rights and duties of the parties an essential element of his case. He presents a claim and discloses a controversy of such a nature that it can only be correctly determined by a declaration of the law under and in the light of the Act of Congress . . . ." *Downey v. Geary-Wright Tobacco Co.*, 39 F. Supp. 33, 36 (E. D. Ky.). And so, as here, a claim which is founded on federal law arises under that law in pristine form.[28]

The present case is well within any expression of the tests of federal question jurisdiction. (1) "To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action." *Gully v. First Nat. Bank*, 299 U.S. 109, 112. In this case, federal law is an indispensable ingredient of plaintiff's cause of action, for the legal effect of the award issued by the adjustment board is derived from and controlled by the air part of the Railway Labor Act. (2) "A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not

[28] *Peyton v. Railway Express Agency*, 316 U.S. 350; *Tunstall v. Brotherhood of Locomotive Firemen*, 323 U.S. 210, 213; *American Federation of Labor v. Watson*, 327 U.S. 582, 591.

so arise unless it really and substantially involves a controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends." *Shulthis* v. *McDougal*, 225 U.S. 561, 569. In an action to enforce an award issued by an adjustment board the standard to be applied in testing the validity of the award is at the threshold of adjudication of the controversy. The standard is federally fashioned and draws its content from the air part of the Railway Labor Act. It therefore involves a "construction" of the laws of the United States. And whether the particular award will be enforced, modified, or vacated depends upon the application of the federal standard in the specific circumstances of the case. It therefore involves the "effect" of the laws of the United States. Hence, in every meaningful sense the action "really and substantially" involves a controversy concerning the "construction or effect" of federal law "upon the determination of which the result depends."[29] (3) "The federal nature of the

[29] "What, then, do the courts mean when they say that the construction of federal law must be involved in order to confer this jurisdiction? Certainly not that the case will necessarily turn upon an interpretation of the statute, but simply that the complaint must set forth a cause of action of which federal law is an essential ingredient, and which may, therefore, properly involve a construction of that law." *McGoon* v. *Northern Pacific Ry. Co.*, 204 Fed. 998, 1004 (D.N.D.). Referring to the rule that a case does not arise under the laws of the United States "unless it really and substantially involves a dispute or controversy as to the effect or construction of the Constitution or law", Judge Augustus Hand has stated that "Such language, however, is not applicable to cases where the right relied upon by the person bringing the suit was based upon a federal law, but to cases where that law was not directly and necessarily the basis of the action." *Wells Fargo & Co.* v. *Cuneo*, 241 Fed. 726, 727 (S.D.N.Y.). The thought behind this view is that where, as here, an action is "based upon a federal law" the application of any test of federal question jurisdic-

right to be established is decisive—not the source of the authority to establish it." *Puerto Rico* v. *Russel & Co.*, 288 U.S. 476, 483. In this case the right asserted is federal in origin, scope, and attributes. What it is depends on what federal law makes it into. It is altogether a federal creature.[30] It is therefore wholly clear that federal question jurisdiction exists.

B. Access to the Federal District Court to Enforce the Award Which Otherwise Exists by Reason of Federal Question Jurisdiction Is Not Impliedly Withheld by the Air Part of the Railway Labor Act.

In concluding that access to the federal district court to enforce the award does not exist by reason of federal question jurisdiction, the true posture of decision by the court below is that, although "federal law governs the scope of judicial review of an award made by a system board of arbitration" (R. 45, n. 7), it is inferable from the air part of the Railway Labor

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tion to the action is virtually redundant. Such an action is inherently federal in nature and any test which would exclude it from federal question jurisdiction would expose the fallacy of the test rather than the absence of jurisdiction. The axiomatic character of this proposition is revealed by the single sentence disposition of this aspect of federal question jurisdiction in Hart and Wechsler, The Federal Courts And The Federal System, 763 (1953): "That an action arises under federal law if the plaintiff asserts a federally-created cause of action seems plain."

[30] Compare the cases holding that a suit against a surety based upon a bond of a United States marshal (*Feibelman* v. *Packard*, 109 U. S. 421), a bond of a clerk of a federal court (*Howard* v. *United States*, 184 U.S. 676), a supersedeas bond (*American Surety Co.* v. *Schultz*, 237 U.S. 159), and a materialmen's bond (*United States ex rel. Giant Powder Co.* v. *Axman*, 152 Fed. 816 (C.C. Cal.)), arises under a law of the United States and therefore confers federal question jurisdiction, because the requirement of the bond derives from federal law and its attributes are determined by federal law

Act that notwithstanding the dependence of the action on federal law Congress nevertheless committed enforcement of the award to state courts and withheld jurisdiction from the federal courts in the absence of diversity (R. 46-51). On this view vindication of this federal right is to reside in the state courts in accordance with the judicial scheme which prevailed until 1875 when Congress initially invested the federal courts with federal question jurisdiction.[31] In other words, Congress in 1936 in enacting the air part of the Railway Labor Act *pro tanto* repealed the Judiciary Act of 1875 and its successors and deprived the federal courts in this area of the federal question jurisdiction which would otherwise exist by virtue of the general statutory grants. There is no reasonably tenable basis upon which to entertain much less to accept this position.

The court below bases its position on a difference it perceives between an adjustment board contractually established pursuant to the statutory duty to create it and the permanent National Air Transport Adjustment Board which the National Mediation Board is empowered to establish but has not set up. Section 205 of the air part of the Railway Labor Act provides that, "When, in the judgment of the National Mediation Board, it shall be necessary to have a permanent national board of adjustment in order to provide for the prompt and orderly settlement of disputes . . . growing out of grievances or out of the interpretation or application of agreements . . . , the National

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[31] See *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 362-368; Hart and Wechsler, The Federal Courts And The Federal System, 729-733 (1953); Mishkin, *The Federal "Question" In the District Courts*, 53 Col. L. Rev. 157 (1953).

Mediation Board is hereby empowered and directed" to cause the establishment of "a board which shall be known as the National Air Transport Adjustment Board." This latter board is to function "in the same manner and to the same extent as provided with reference to the National Railroad Adjustment Board by Section 3 of Title I of this Act" and the "powers and duties" of the National Air Transport Adjustment Board are to be identical with those of the National Railroad Adjustment Board. An award issued by the National Railroad Adjustment Board is in terms enforceable in a District Court of the United States (RLA, title I, sec. 3(p)), and like access to a federal district court is therefore in terms available to enforce an award made by the National Air Transport Adjustment Board. The court below concludes that the specific provision for recourse to a federal district court to enforce an award issued by the National Air Transport Adjustment Board, in comparison with the absence of a like provision in the case of an award issued by the contractually established adjustment board, negatively implies that Congress barred recourse to a federal court in the absence of diversity to enforce an award issued by the latter board (R. 46-51; *Metcalf* v. *National Airlines*, 271 F.2d 817, 819-820 (C.A. 5)). It calls the awards of the contractual board "lower-status awards" (R. 47), and states that Congress made it "clear that it was not elevating to the same rank the status of an award" of a contractual board as it granted to an award issued by either the National Railroad Adjustment Board or the National Air Transport Adjustment Board. *Metcalf* v. *National Airlines, supra*, at 819. The court below buttresses its conclusion with

the speculation that, as state courts were receptive to enforcement of an award when issued in contradistinction to their hostility to enforcement of an executory agreement to arbitrate a future dispute, Congress might therefore have concluded that commitment of enforcement of the award to state courts in the absence of diversity did not jeopardize the federal scheme (R. 48-51).

The immediate trouble with the exposition by the court below is that it has nothing to do with the reasons Congress actually entertained in providing for the creation of both a contractual board and a National Air Transport Adjustment Board. The original draft of the bill which became the air part of the Railway Labor Act contained in the identical form in which it was finally enacted the provision empowering the National Mediation Board to establish the National Air Transport Adjustment Board when "it shall be necessary to have a permanent national board of adjustment. . . ." However, unlike the finally enacted version, the original draft contained no provision requiring the handling of grievance disputes in the "usual manner" and making it the "duty" of the parties "to establish" an adjustment board. Instead, section 203 of the original draft provided that the "jurisdiction of the National Mediation Board is extended to and shall cover *each and every dispute*," and section 204 left it optional with the parties to establish an adjustment board by agreement.[32] George A. Cook, secretary of

[32] Hearings before the Subcommittee of the Senate Interstate Commerce Committee on S. 2496, 74th Cong., 1st Sess., 1-2 (1935):

Sec. 203. The jurisdiction of the National Mediation Board is extended to and shall cover each and every dispute between said carriers by air or any of them and its or their employees, and the services of the National Mediation Board may be invoked in

the National Mediation Board, expressed on behalf of the Board two reasons in opposition to this arrangement. First, it "appears to place upon the National Mediation Board the burden of adjusting by mediation the individual grievances of employees by air. This is likely to produce such a vast volume of work as to interfere seriously with the capacity of the National Mediation Board to fulfill the functions placed upon it by the Railway Labor Act." Second, "the bill in its present form would therefore depart from the plan devised in the Railway Labor Act for handling disputes among employees of the railroads, where the line is drawn so that the Mediation Board will deal only with representation cases and cases involving larger questions of changes in rules and working conditions, leaving to the National Railroad Adjustment Board the settlement of individual grievances arising or disputes involving the interpretation of contracts." [33] The National Mediation Board therefore suggested compulsory creation of an adjustment board

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the same manner and to the same extent as though any or all such disputes were specifically mentioned in section 5 of title I of this Act.

Sec. 204. Nothing in this title shall be construed to prevent any individual carrier, system or group of carriers by air, and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this title, from mutually agreeing to the establishment of system, group, or regional boards of adjustment under the authority of section 3 of title I of this Act; or, pending the establishment of a permanent national board of adjustment as hereinafter provided, to prevent said carriers by air and any class or classes of their employees, all acting through their representatives, selected in accordance with the provision of this title, from mutually agreeing to the establishment of a national board of adjustment of temporary duration and of similarly limited jurisdiction.

[33] *Id.* at 11.

by the parties to substitute for the method of handling proposed by the original draft.[34] The bill as finally enacted adopted the suggestion of the National Mediation Board in the exact form that the Board had recommended.[35]

At the Senate committee hearing, in considering the suggestion of the National Mediation Board for compulsory creation of an adjustment board, Senator Black inquired whether the substitution would diminish the benefits available to employees of air carriers and he was assured that it would not:[36]

> Senator BLACK. As to substituting for sections 203 and 204 what you suggest, might I ask if those substitutes are drawn in such a way as to give exactly the same range to the men engaged in air transport as would be invoked by men engaged in railroad employment.
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> Mr. COOK. I understand so.
>
> Senator BLACK. The object is not to impair the effectiveness of the bill, but simply to make it apply with uniformity to both classes of employees, as I understand.
>
> Mr. COOK. That is correct.

Not only does the adjustment board contractually established pursuant to statutory duty "give exactly the same range to the men," but the reason that Congress had for postponing the establishment of a National Air Transport Adjustment Board—an event which has not yet occurred and is not likely to in the foreseeable future—is without any substantive sig-

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[34] *Ibid.*

[35] *Ibid.*

[36] *Id.* at 12.

nificance. "The reason for this permissive delay in its formation is that there is nothing for such a board to do until employment contracts have been completed, and there are no such contracts in operation now. In this way unnecessary expense is avoided until the need arises." H. Rep. No. 2243, 74th Cong., 2d Sess., 1 (1936).

There is thus no basis for invidious comparison between a contractual board and the National Air Transport Adjustment Board. Congress has ordained both. Each is a coequal method of adjustment possessing commensurate capacity for effective achievement of the congressional objective "to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules or working conditions." Congress deferred establishment of a permanent national air adjustment board simply to avoid "unnecessary expense", and the alternative it mandated of compulsory creation of a contractual board was a fully effective substitute. Congressional frugality bears no interpretation that a permanent national board, if and when established, constitutes a superior form of adjudication. On the contrary, even if a permanent national board is organized, the parties remain free to retain the contractual board; the contractual board is disestablished only if it "is not satisfactory to either party thereto", and the dissatisfied party upon ninety days' notice to the other "may elect to come under the jurisdiction of the National Air Transport Adjustment Board" (RLA, title II, sec. 205, last sentence). Similarly, under the rail part of the Railway Labor Act, notwithstanding the creation of the National Railroad Adjustment Board, the par-

ties are not prevented "from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section" (RLA, title I, sec. 3 second). The committee reports show that a contractual board thus set up by voluntary agreement is regarded by Congress as at least a co-equal if not indeed a superior method of adjustment. The Senate Report observed that (S. Rep. No. 1065, 73d Cong., 2d Sess., 2):

> The bill also provides for the establishment of regional or system boards of adjustment, if the railroads and the employees desire to set up such boards voluntarily. The ideal situation would be to have disputes and grievances settled by the men and management on the several properties without any recourse to adjudication by an outside tribunal. Some of those advocating this legislation believe the fact that there is a compulsory board to which grievances may be taken will greatly increase the settlement of disputes by voluntary adjustment boards between the employees and the railroads.

The House Report observed that (H. Rep. No. 1944, 73d Cong., 2d Sess., 3-4):[37]

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[37] George M. Harrison, president of the Brotherhood of Railway Clerks, testified that "it is our intention and our purpose that such system boards, group boards, or regional boards that are established by the parties, by agreement, will provide such terms that the decisions can be enforced in the courts. The fact of the matter is the present law provides for that. It provides that decisions shall be final and binding and conclusive on the parties, and I think that kind of decision can be enforced." Hearings before the Senate Interstate Commerce Committee on S. 3266, 73d Cong., 2d Sess., 34 (1934). See also his testimony to like effect in Hearings before the House Interstate Commerce Committee on H.R. 7650, 73d Cong., 2d Sess., 88-89 (1934).

> Finally, the bill gives absolute freedom to the carriers and the employees to establish any other machinery upon which they may voluntarily agree. If such voluntary machinery should be established, then the parties are exempt from the jurisdiction of this National Board.

Congress has thus established coequal methods of adjustment in providing for the creation of both a contractual board and the National Air Transport Adjustment Board. This duality furnishes no basis for the court below to depreciate the award of the contractual board as "lower-status" or to attribute an inferior "rank" to it (*supra*, p. 43). Since an award by either type of board has commensurate dignity, access to a federal district court to enforce an award issued by the National Air Transport Adjustment Board suggests equivalent access to enforce an award issued by a contractual board. Specific provision in the air part of the Railway Labor Act for recourse to a federal district court to enforce an award of the National Air Transport Adjustment Board, if it plausibly argues in favor of any differentiation, implies that the federal court is the *exclusive* forum for enforcement of an award rendered by that board. But it does not imply debarment from the federal court in the absence of diversity to enforce an award rendered by the contractual board. The general statutory grants of federal question jurisdiction confer an incontrovertible basis for invoking the competence of the federal courts for this purpose. Silence or tenuous negative implication does not destroy this fountainhead of jurisdiction. As the court below itself acknowledges, it would be "ironical that of all the large industries engaged in interstate commerce only in the airling industry are parties to a collective bargaining agreement denied

access to federal district courts in non-diversity cases for the purpose of enforcing arbitration awards. If any industry should have ready access to federal courts because of the interstate character of its business, it is the airline industry" (R. 59). Access exists by virtue of the grant of federal question jurisdiction. To be sure, state courts have concurrent jurisdiction to enforce an award of the contractual board.[38] But the court below holds that state courts, in the absence of diversity have jurisdiction to the exclusion of the federal courts. This conclusion can only be accepted by finding in the 1936 enactment of the air part of the Railway Labor Act a *pro tanto* repeal of the statutory grant of federal question jurisdiction which has existed since 1875. To borrow the language of the court below, this conclusion is impermissible on "the tenuous basis suggested here" (R. 51), especially in view of the "elementary" principle "that repeals by implication are not favored."[39]

The impermissibility of the conclusion is further exposed by the self-defeating character of a major reason assigned by the court below to support it. The court below speculates that, as state courts were receptive to enforcement of an award when issued in contradistinction to their hostility to enforcement of an executory agreement to arbitrate a future dispute, Congress might have concluded that commitment of enforcement of the award to state courts in the absence of diversity would not jeopardize the federal scheme (R. 48-51). The logic of this position is that federal courts would have jurisdiction to grant specific per-

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[38] *Cf., Doud Box Co.* v. *Courtney*, 368 U.S. 402; *Local 174, Teamsters Union* v. *Lucas Flour Co.*, 369 U.S. 95.

[39] *Georgia* v. *Pennsylvania R.R. Co.*, 324 U.S. 439, 456-457.

formance of an agreement to submit disputes to the adjustment board in view of the state courts' antagonism to this branch of arbitration. But jurisdiction to compel specific performance of an agreement to arbitrate cannot be tenably divorced from jurisdiction to enforce the ensuing award. "'If there is jurisdiction in one case it would seem there should be jurisdiction in the other. * * * The purpose of Congress to give effect to employer-union contracts and to afford full relief for breaches of those contracts would be frustrated if the courts should decree specific performance to agreements to arbitrate but deny enforcement to arbitration awards which the parties have agreed in advance to accept. * * * If arbitration can be specifically enforced, the court should have power to afford complete relief by enforcing the award." *Textile Workers Union* v. *Cone Mills Corp.*, 268 F.2d 921, 924-925 (C.A. 4). See also, *United Steelworkers* v. *Enterprise Wheel and Car Corp.*, 363 U.S. 593, 595-596.

Consideration of another significant aspect of the statutory scheme confirms the untenability of implying from the air part of the Railway Labor Act lack of federal jurisdiction to enforce the award. It is settled that a union subject to the rail part of the Railway Labor Act may be enjoined by a federal district court from striking over a dispute pending before the National Railroad Adjustment Board. *Supra*, pp. 17-18, 21 n. 7. The same conclusion has been reached as to unions subject to the air part of the Railway Labor Act based upon the identity of function performed by the adjustment board under the air part as is performed by the NRAB under the rail part and the duty of adherence to the adjustment procedure compulsorily prescribed by both parts. *IAM* v. *North-*

west Airlines, 50 LRRM 2499 (C.A. 8, June 19, 1962); *cf., Flight Engineers* v. *American Airlines*, 50 LRRM 2453 (C.A. 5, June 7, 1962). It would be anomalous indeed to hold that in air transportation a federal district court has power to enjoin a union from striking over a dispute pending before the adjustment board but no power to enforce the award favorable to the union thereafter issued as a result of the very procedure which the injunction has been designed to protect. Obviously, the power to safeguard the adjustment process while it is in progress carries with it the power to put into effect the fruits of the procedure. It would be sheer caprice to imply ouster of the federal court's power at the culminating step. Furthermore, the power of the federal court to intervene to enjoin a strike is based on ascription of the same status to the adjustment board under the air part as is enjoyed by the NRAB under the rail part, and further undercuts the assumption of the court below that the adjustment board occupies lower-status or inferior rank. Indeed, were it true that the adjustment board's position is subordinate, it would undercut the premise on which the federal court's power to issue a strike injunction is founded in the first place.

In sum, consideration of the statutory scheme as a whole permits no basis for implying that the air part of the Railway Labor Act withholds power from a federal district court to enforce an award issued by an adjustment board which otherwise exists by reason of federal question jurisdiction.

C. Federal Question Jurisdiction Cannot Be Defeated by the Patent Self-Contradiction That, Although "Federal Law Governs the Scope of Judicial Review" of the Award, a Suit to Enforce the Award Is a "State-Created Action."

The court below agrees that "federal law governs the scope of judicial review of an award made by a system board of adjustment . . ." (R. 45, n. 7). It nevertheless states that a suit to enforce the award "is nothing more than a state-created action to construe a contract" (R. 59). This is a patent self-contradiction. And on the basis of this self-contradiction the court below denies the existence of federal question jurisdiction (R. 52-59).

Law "'in the sense in which courts speak of it today does not exist without some definite authority behind it.'" *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 79. An action is created by the sovereign who prescribes the rules for its governance. Congress through the enactment of the air part of the Railway Labor Act prescribes the rules for the governance of an action to enforce an award of an adjustment board. Its command that disputes over grievances or the interpretation or application of agreements shall be determined by an adjustment board of itself indelibly establishes the federal character of the action. "For the remedy by arbitration, whatever its merits or shortcomings, substantially affects the cause of action . . . . The nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action. The change from a court of law to an arbitration panel may make a radical difference in ultimate result." *Bernhardt* v. *Polygraphic Co.*, 350 U.S. 198, 203.[40] See

[40] This was said of a state-created action on a contract brought in a federal court by reason of diversity. Because of the affect on the action of the arbitral remedy, this Court required reference

also, *Drake Bakeries* v. *Local 50, American Bakery Workers*, 370 U.S. 254, 266. The arbitral mode is especially significant in the enforcement of the labor agreement, for "arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself." *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 578. The requirement of recourse to the adjustment board is an integral adjunct of the substantive rights conferred by the agreement and strongly influences their import. "The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement." *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 581. State law plays no part in the operation of this process. In determining disputes over the interpretation and application of the agreement, the adjustment board "may of course look for guidance from many sources" (*United Steelworkers* v. *Enterprise Wheel and Car Corp.*, 363 U.S. 593, 597), but it owes no duty of obedience to state law in arriving at an award which is faithful to the agreement. Insofar as an outside sovereign is empowered to influence the result at all, it is federal law which is operative through the application of a federal standard in determining whether to enforce, modify, or vacate the award. By control over the enforceability of the award federal law establishes the limits within which the adjustment board is free to act and which the board is bound to respect if it is to issue viable awards. The upshot is that state law does not

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to the law of the state creating the action (including its conflict of laws rule) to determine whether the state would compel arbitration. Where, as here, federal law compels arbitration, displacing any contrary state law, the right to be enforced via arbitration cannot be state-created, for the sovereign who controls the remedy to enforce the right controls the right.

require creation of the adjustment board; state law cannot forbid establishment of the adjustment board; state law cannot release the parties from obligatory recourse to the adjustment board; the adjustment board operates free of state law; and state law does not control the enforceability of the award. It is therefore impossible to conclude that a suit to enforce the award "is nothing more than a state-created action to construe a contract" (R. 59). It cannot be state-created if state law does not enter into it.[41] Law "is not a brooding

[41] The cases relied upon by the court below to show that the action is state-created are not helpful. (1) *Duplisea* v. *Maine Central Railroad*, 260 F. 2d 495 (C.A. 1), cited at R. 45, n. 6, 48, 57, pertains to the narrow exception where an employee accepts his severance from employment as final and sues to recover damages for wrongful discharge in breach of contract. *Supra*, p. 21, n. 7. (2) *Hayes* v. *Union Pac. R. Co.*, 184 F. 2d 337 (C.A. 9), cited at R. 58, is a case which this Court has stated "was decided incorrectly." *Conley* v. *Gibson*, 355 U.S. 41, 44, n. 4. (3) The disposition in *Shipley* v. *Pittsburgh & L.E.R. Co.*, 70 F. Supp. 870 (D.C. Pa.), cited at R. 58, seems erroneous in view of the exclusive commitment to the National Railroad Adjustment Board of controversies of the kind involved in that case. *Supra*, p. 21, and n. 7. (4) *Amalgamated Association* v. *Southern Bus Lines*, 189 F. 2d 219 (C.A. 5), cited at R. 56, is an action to compel arbitration of *new* contract terms as distinguished from a dispute as to the interpretation or application of an existing agreement. Arbitration of *new* contract terms is a specialized situation upon which this Court has not yet spoken and which presents differentiating considerations which perhaps take it out of the rule of *Lincoln Mills*. *Boston Printing Pressmen's Union* v. *Potter Press*, 141 F. Supp. 553 (D. Mass.), affirmed, 241 F. 2d 787 (C.A. 1), cert. denied, 355 U.S. 817. An action to compel arbitration of a dispute as to the meaning or application of an existing agreement does of course arise under the federal law in an industry covered by the Labor Management Relations Act, 1947. *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448. The import of the United States Arbitration Act in this situation, much considered and disputed before *Lincoln Mills* (*Local 205, United Electrical Workers* v. *General Electric Co.*, 233 F. 2d 85 (C.A. 1), affirmed, 353 U.S. 547; Cox, *Grievance Arbitration in The Federal Courts*, 67 Harv. L. Rev. 591 (1954)), has been rendered supererogatory by *Lincoln Mills*.

omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified. . . .'"[42] The only sovereign in this field is Congress.

Nor does the court below advance its position by asserting that federal law does not require the carrier and the representative to incorporate any particular substantive terms into their agreement (*e.g.*, the wage rate) but leaves them free to fix the terms for themselves (R. 46, n. 8, 59).[43] The federal law which vouchsafes this freedom also requires the state law to refrain from interfering with it. *Local 24, International Brotherhood of Teamsters* v. *Oliver*, 358 U.S. 283, 295-296. But this freedom is irrelevant after agreement is reached and the question then becomes the means

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[42] Mr. Justice Holmes dissenting in *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205, 222. See also, *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 102.

[43] In this case, the aggrieved employee's right to union representation in the investigation and hearing of his discipline or discharge, explicitly granted by the agreement (R. 16) and enforced by the award (R. 10-26), is a right which is also conferred by the Railway Labor Act independently of the agreement. Section 2, fourth, of the Railway Labor Act provides that "Employees shall have the right to . . . bargain collectively through representatives of their own choosing." Grievance adjustment is of course an integral part of collective bargaining (*Conley* v. *Gibson*, 355 U.S. 41, 46-47; *Aeronautical Industrial District Lodge 727* v. *Campbell*, 337 U.S. 521), and contested cases of discipline or discharge are grist for the grievance mill. The employee aggrieved by his discipline or discharge is therefore entitled to union representation in contesting it as part of his "right to . . . bargain collectively through representatives of his own choosing." Accordingly, the particular underlying right in issue in this case is one that the carrier is required to respect by statute independently of its protection by contract.

of enforcing the substantive terms that have been voluntarily undertaken. "If a man makes a contract he gives up the constitutional right that previously he had to be free from the hamper that he puts upon himself."[44] And federal law alone fashions the "hamper" when the agreement is between an air carrier and the representative of its employees. Enforcement of the underlying rights conferred by the agreement is determined by the adjustment board independently of state law, and enforcement of the award issued by the board encasing those rights is determined by a court independently of state law.

Also beside the point is the principle invoked by the court below that an action does not arise under federal law if the federal question enters only by way of defense (R. 54-55). The postulate of the court below is that in this case a federal question is implicated only if the carrier in resisting enforcement of the award challenges the jurisdiction of the adjustment board and thereby requires a construction of the Railway Labor Act which defines that jurisdiction (*ibid.*). The court below supplied its own refutation when it agreed that "federal law governs the scope of judicial review of an award made by a system board of adjustment . . . " (R. 45, n. 7). Federal law enters the case with the plaintiff. It is the only law upon which he relies or which he can invoke to support his claim for enforcement of the award.

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[44] Mr. Justice Holmes dissenting in *Power Mfg. Co.* v. *Saunders*, 274 U.S. 490, 497.

CONCLUSION

For the reasons stated, the judgment should be reversed and the case remanded to the District Court with instructions to take jurisdiction and decide the merits of the claim.

Respectfully submitted,

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August 1962.

APPENDIX

I

The Railway Labor Act, as amended (44 Stat. 577, 48 Stat. 1185, 49 Stat. 1189, 45 U.S.C. § 151, *et seq.*), provides in pertinent part that:

TITLE I

* * *

Sec. 2. General Purposes. The purposes of the Act are:

(1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

General Duties. First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

* * *

Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. * * *

Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held * * *

Sec. 3. National Board of Adjustment; Grievances, Interpretation of Agreements. First. There is hereby established, a Board, to be known as the "National Railroad Adjustment Board." * * *

(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

* * *

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when prop-

erly submitted, at any place designated by the division: Provided, however, That final awards as to any such dispute must be made by the entire division as hereinafter provided,

(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this Section, then such division shall forthwith agree upon and select a neutral person, to be known as "referee," to sit with the division as a member thereof and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this Act for the appointment of arbitrators and shall fix and pay the compensation of such referees.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(n) A majority vote of all members of the division of the Adjustment Board shall be competent to make an award with respect to any dispute submitted to it.

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

• • •

Second. Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this Act, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

• • •

Sec. 5. Functions of Mediation Board. First. The parties, or either party, to a dispute between an employee or

group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

• • •

TITLE II

Section 201. All of the provisions of title I of this Act, except the provisions of Section 3 thereof, are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.

Sec. 202. The duties, requirements, penalties, benefits, and privileges prescribed and established by the provisions of Title I of this Act, except Section 3 thereof, shall apply to said carriers by air and their employees in the same manner and to the same extent as though such carriers and their employees were specifically included within the definition of "carrier" and "employee," respectively, in Section 1 thereof.

Sec. 203. The parties or either party to a dispute between an employee or a group of employees and a carrier or carriers by air may invoke the services of the National Mediation Board and the jurisdiction of said Mediation Board is extended to any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to an adjustment board, as hereinafter provided, and not adjusted in con-

ference between the parties, or where conferences are refused.

The National Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

The services of the Mediation Board may be invoked in a case under this title in the same manner and to the same extent as are the disputes covered by Section 5 of title I of this Act.

Sec. 204. The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.

It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of this title, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of Section 3, Title I, of this Act.

Such boards of adjustment may be established by agreement between employees and carriers either on any individual carrier, or system, or group of carriers by air and any class or classes of its or their employees; or pending the establishment of a permanent National Board of Adjustment as hereinafter provided. Nothing in this Act shall prevent said carriers by air, or any class or classes of their employees, both acting through their representatives selected in accordance with provisions of this title, from mutually agreeing to the establishment of a National Board of Adjustment of temporary duration and of similarly limited jurisdiction.

Sec. 205. When, in the judgment of the National Mediation Board, it shall be necessary to have a permanent national board of adjustment in order to provide for the prompt and orderly settlement of disputes between said carriers by air, or any of them, and its or their employees, growing out of grievances or out of the interpretation or application of agreements between said carriers by air or any of them, and any class or classes of its or their employees, covering rates of pay, rules, or working conditions, the National Mediation Board is hereby empowered and directed, by its order duly made, published, and served, to direct the said carriers by air and such labor organization of their employees, national in scope, as have been or may be recognized in accordance with the provisions of this Act, to select and designate four representatives who shall constitute a board which shall be known as the National Air Transport Adjustment Board. Two members of said National Air Transport Adjustment Board shall be selected by said carriers by air and two members by the said labor organizations of the employees, within thirty days after the date of the order of the National Mediation Board, in the manner and by the procedure prescribed by Title I of this Act for the selection and designation of members of the National Railroad Adjustment Board. The National Air Transport Adjustment Board shall meet within forty days after the date of the order of the National Mediation Board directing the selection and designation of its members and shall organize and adopt rules for conducting its proceedings, in the manner prescribed in Section 3 of Title I of this Act. Vacancies in membership or office shall be filled, members shall be appointed in case of failure of the carriers or of labor organizations of the employees to select and designate representatives, members of the National Air Transport Adjustment Board shall be compensated, hearings shall be held, findings and awards made, stated, served, and enforced, and the number and compensation of any necessary assistants shall be determined and the compensation of such employees shall be paid, all in the same manner and to the same extent as provided with reference to the National Railroad Adjustment Board by Section 3 of Title I of this Act. The powers and duties prescribed and established by the provisions of Section 3 of Title I of this Act with reference to the National Railroad Adjustment Board and the several divisions thereof are hereby conferred upon

and shall be exercised and performed in like manner and to the same extent by the said National Air Transport Adjustment Board, not exceeding, however, the jurisdiction conferred upon said National Air Transport Adjustment Board by the provisions of this title. From and after the organization of the National Air Transport Adjustment Board, if any system, group, or regional board of adjustment established by any carrier or carriers by air and any class or classes of its or their employees is not satisfactory to either party thereto, the said party, upon ninety days' notice to the other party, may elect to come under the jurisdiction of the National Air Transport Adjustment Board.

• • •

II

Section 301(a) of the Labor Management Relations Act, 1947 (61 Stat. 156, 29 U.S.C. §185(a)) provides that:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

III

1. 28 U.S.C. §1331(a), 62 Stat. 930, amended 72 Stat. 415, provides that:

The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

2. 28 U.S.C. §1337, 62 Stat. 931, provides that:

The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

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IN THE

Supreme Court of the United States

October Term, 1962

No. 61

INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, R. K. DOUD, S. V. CORNSTUBBLE, O. L. BROOM, C. R. CASEY, P. R. DAVIS, and E. E. FUQUA,
Petitioners,

v.

CENTRAL AIRLINES, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, *AMICUS CURIAE*

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Petitioners,

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CENTRAL AIRLINES, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, *AMICUS CURIAE*

Preliminary Statement

At issue in the instant case is the jurisdiction of the District Courts of the United States under 28 U. S. C. §§ 1331 and 1337 over suits to enforce awards of boards of adjustment established under collective bargaining agreements between air carriers and the representatives of their employees pursuant to Section 204 of the Railway Labor Act, 49 Stat. 1189, 45 U. S. C. § 184. The Air Line Pilots Association, International, submits this brief as *amicus curiae* with the written consent of the parties as provided in Rule 42 of the Rules of this Court.

Interest of Air Line Pilots Association, International

The Air Line Pilots Association, International, hereinafter called "ALPA", is an unincorporated association organized for the purposes and objects of a labor union. It represents, among others, the professional airline pilots in the employ of all scheduled common carriers by air of the United States, approximately 15,000 pilots. ALPA is the collective bargaining representative for these pilots under the Railway Labor Act, and as such it is a party to collective bargaining agreements with about fifty common carriers by air.

ALPA has been the representing organization for professional pilots of scheduled air carriers in the United States since 1931. Since the passage of Title II of the Railway Labor Act in 1936, ALPA has in every instance negotiated and observed agreements for the establishment of boards of adjustment with the carriers with whom it has engaged in collective bargaining negotiations. It has done so pursuant to the mandate of Section 204 of the Railway Labor Act, 45 U. S. C. § 184. Each one of the collective bargaining agreements to which ALPA is a party contains specific machinery for the investigation and hearing of disputes arising from grievances or from the application or interpretation of the agreement. When such disputes are not resolved by ALPA and the carrier under established procedures, the agreement provides for referral of the dispute to a board of adjustment with provision for final and binding determination utilizing, if need be, a neutral arbitrator.

This dispute settlement machinery has been established by ALPA and the air carriers as required by the Railway Labor Act and has been effective to carry out the purposes of that Act expressed in Section 2, 48 Stat. 1186-1187, 45 U. S. C. Section 151a, as follows:

> "• • • • (1) To avoid any interruption to commerce or to the operation of any carrier engaged

> therein; * * * (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions."

An important element in the effectiveness of this machinery is the certainty that final awards made pursuant thereto will be binding and enforceable on the parties to the proceeding. By making enforcement of board of adjustment awards dependent on the variant provisions of the laws of the fifty States, the decision of the Court below impairs the certainty of enforcement and thereby reduces the important contribution that the mandatory grievance machinery makes to the carrying out of the express purposes of the Railway Labor Act.

ALPA respectfully submits that the decision of the Court below is an incorrect one that did not give adequate recognition to the rights established and protected by the Railway Labor Act and the duties imposed on air carriers, their employees, and representing organizations under the Act. Nor does the decision below sufficiently take into account that the collective bargaining process and the resulting agreements are of a federal nature, necessarily implementing such rights, duties and mandates.

ARGUMENT

Suits to enforce awards of boards of adjustment established pursuant to the mandate of Section 204 of the Railway Labor Act are cases arising under the laws of the United States over which District Courts have jurisdiction under 28 U. S. C. §§ 1331 and 1337.

Collective bargaining agreements between air carriers and their employees are governed by the provisions of the Railway Labor Act and federal law established by the courts of the United States in accordance with the policies

of that Act. This is apparent when the extent to which the Railway Labor Act controls such collective bargaining agreements is considered.

Such contracts are entered into in order to achieve the federal purposes explicitly set forth in Section 2 of the Act, 45 U. S. C. Section 151a. The duties to engage in negotiations to enter into collective bargaining agreements and to "maintain" them are imposed by Section 2, First and 2, Second of the Railway Labor Act, 45 U. S. C. §§ 152, First, and 152, Second and are enforceable by actions in the federal courts. *Virginian Railway* v. *System Federation, No. 40*, 300 U. S. 515 (1937).

The parties to the negotiations and to the collective bargaining agreements are chosen under safeguards established by Sections 2, Third and 2, Fourth of the Act, 45 U. S. C. §§ 152, Third, and 152, Fourth, and by administrative machinery within the exclusive competence of the National Mediation Board, a federal agency. Railway Labor Act, § 2, Ninth, 45 U. S. C. § 152, Ninth; *Switchmen's Union* v. *NMB*, 320 U. S. 297 (1943); *UNA Chapter, FEIA* v. *NMB*, 294 F. 2d 905 (D. C. Cir. 1961), *cert. denied*, 368 U. S. 956 (1962).

Once these collective bargaining agreements have been entered into, the working conditions prescribed by them may be modified only in accordance with the formalities outlined in the Act. See Railway Labor Act, §§ 2, Seventh; 6; 5, First; 10; 45 U. S. C. §§ 152, Seventh; 156; 155, First; 160; *Order of Railroad Telegraphers* v. *Railway Express Agency*, 321 U. S. 342 (1944); S. Rep. No. 895, 74th Cong., 1st Sess., pp. 1-3 (1935); H. R. Rep. No. 2243, 74th Cong., 2d Sess., pp. 3-4 (1936). Indeed, this formal procedure effectively determines the term of the agreement since neither party to the agreement may change the *status quo* until thirty days after the last step in the procedure. See Railway Labor Act §§ 6; 5, First; 10; 45 U. S. C. §§ 156; 155, First; 160.

The United States District Courts have jurisdiction to enjoin compliance with these mandates of the Act.* See *Railroad Conductors* v. *Pitney*, 326 U. S. 561 (1946); *Virginian Railway* v. *System Federation*, No. 40, 300 U. S. 515 (1937); *Railroad Yardmasters* v. *Pennsylvania R.R.*, 224 F. 2d 226 (3rd Cir. 1955); *Railway Clerks* v. *Atlantic Coast Line R.R.*, 201 F. 2d 36 (4th Cir. 1953), *cert. denied*, 345 U. S. 992 (1953); *American Airlines* v. *ALPA*, 169 F. Supp. 777 (S. D. N. Y. 1958). In addition, wilful violation of certain provisions of the Act, including Section 2, Seventh, 45 U. S. C. § 152, Seventh, which prohibits a carrier from changing working conditions of its employees except in the manner prescribed in the Act, is a federal criminal offense. See Railway Labor Act, § 2, Tenth, 45 U. S. C. § 152, Tenth.

Contrary to the statement in the decision below

> "• • • that Congress did not choose the direct course of providing that federal law, statutory or decisional, should control the substantive features of labor contracts in the airlines industry • • •." (295 F. 2d at p. 212),

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* The District Courts are not divested of jurisdiction to enforce the mandates of the Railway Labor Act when a violation of those mandates by a carrier also constitutes a breach of the carrier's obligation under a collective bargaining agreement. See *Railroad Conductors* v. *Pitney*, 326 U. S. 561 (1946); dissenting opinion of Judge Clark in *Baltimore and Ohio R.R.* v. *United Railroad Workers*, 271 F. 2d 87, 92-93 (2d Cir. 1959), *judgment vacated and remanded*, 364 U. S. 278 (1960). The power of a District Court to enjoin a unilateral change in working conditions, as a condition of enjoining a strike pending a decision by an adjustment board, was upheld by this Court in *Locomotive Engineers* v. *M-K-T Railroad*, 363 U. S. 528 (1960). The power of a federal court to enjoin a carrier from effectuating a change in working conditions during the pendency of a dispute before an adjustment board in an independent suit by a union was expressly left open by this Court in the *M-K-T case*. See 363 U. S. at p. 531, n. 3.

the Act and decisions of this Court clearly show that the very contents of these collective bargaining agreements are subject to federal law. Thus, agreements entered into pursuant to conduct inconsistent with the duties imposed by the Act on collective bargaining representatives are invalid and compliance with them is enjoinable by a District Court of the United States in a suit in which the jurisdiction of the court is based on 28 U. S. C. § 1337. See *Tunstall* v. *Brotherhood of Locomotive Firemen*, 323 U. S. 210 (1944), in which the Court said:

> "We also hold that the right asserted by petitioner which is derived from the duty imposed by the Railway Labor Act on the Brotherhood, as bargaining representative, is a federal right implied from the statute and the policy which it has adopted. It is the federal statute which condemns as unlawful the Brotherhood's conduct. 'The extent and nature of the legal consequences of this condemnation, though left by the statute to judicial determination, are nevertheless to be derived from it and the federal policy which it has adopted.' *Deitrick* v. *Greaney*, 309 U. S. 190, 200-201; *Board of County Commissioners* v. *United States*, 308 U. S. 343; *Sola Electric Co.* v. *Jefferson Co.*, 317 U. S. 173, 176-7; cf. *Clearfield Trust Co.* v. *United States*, 318 U. S. 363. The case is therefore one arising under a law regulating commerce of which the federal courts are given jurisdiction by 28 U. S. C. § 41(8), Judicial Code § 24(8); *Mulford* v. *Smith*, 307 U. S. 38, 46; *Peyton* v. *Railway Express Agency*, 316 U. S. 350; cf. *Illinois Steel Co.* v. *B. & O. R. Co.*, 320 U. S. 508, 510-511." 323 U. S. at p. 213.

The contents of collective bargaining agreements entered into between air carriers and representatives of their employees are also explicitly determined by the provisions of the Railway Labor Act. Thus, Section 2, Eleventh of the Act provides that such agreements may contain certain provisions but may not contain others. See 45 U.S.C. § 152,

Eleventh. In the railroad industry, the Act provides that collective bargaining agreements between rail carriers and representatives of their employees may provide for the establishment of boards of adjustment. See Railway Labor Act § 3, Second, 45 U.S.C. § 153, Second. In the air transport industry, the Act *requires* that the collective bargaining agreements between carriers and the representatives of their employees provide for such boards of adjustment. It states:

> "It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of this title, to establish a board of adjustment of jurisdiction not exceeeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of Section 3, Title I, of this Act." Railway Labor Act, § 204, 49 Stat. 1189, 45 U.S.C. § 184.

That this provision is mandatory is apparent from its language and from its legislative history. The Bill that was enacted as Title II of the Railway Labor Act, S. 2496, 74th Cong., First Sess., as originally introduced did not require the establishment of boards of adjustment. Section 204 of that Bill made the establishment of such boards optional on the part of the air carriers and the representatives of their employees in language the followed Section 3, Second of the Railway Labor Act, 45 U.S.C. § 153, Second. See *Hearings before a Subcommittee of the Senate Committee on Interstate Commerce on S. 2496, a Bill to amend the Railway Labor Act*, 74th Cong. First Sess., p. 1-2 (1935). Under Section 203 of S. 2496 as introduced, jurisdiction over grievances was to be vested in the National Mediation Board. See *Hearings, supra*, p. 1.

At the Hearings before the Senate Committee on Interstate Commerce, Mr. George A. Cook, then Secretary of the National Mediation Board, objected to Section 203 of the Bill as introduced on the ground that it

> "* * * appears to place upon the National Mediation Board the burden of adjusting by mediation the individual grievances of employees of carriers by air. This is likely to produce such a vast volume of work as to interfere seriously with the capacity of the National Mediation Board to fulfill the functions placed upon it by the present Railway Labor Act." See *Hearings, supra,* p. 11.

Mr. Cook proposed that Sections 203 and 204 of the Bill as originally introduced be amended. His proposal was accepted, and the Bill as passed contained the language suggested by him. See *Hearings, supra,* p. 11. Mr. Cook was questioned by Senator Black as to whether the substitute language was

> "* * * drawn in such a way as to give exactly the same range to the men engaged in air transport as would be invoked by men engaged in railroad employment?"

He replied, "I understand so." Senator Black then said, "The object is not to impair the effectiveness of the bill but simply to make it apply with uniformity to both classes of employees, as I understand," and Mr. Cook affirmed, "That is correct." See *Hearings, supra,* p. 12.

Title II of the Railway Labor Act would not be giving "* * * exactly the same range to the men engaged in air transport as would be invoked by men engaged in railroad employment" if it did not require the establishment of boards of adjustment for the compulsory arbitration of disputes arising out of grievances or out of the interpretation or application of the collective bargaining agreement and provide a federal forum in which adjustment board awards could be enforced. See *Union Pacific R. R.* v. *Price,* 360 U. S. 601, 609-612 (1959); *Railroad Trainmen* v. *Chicago River R. R.,* 353 U. S. 30, 34-39 (1957). Indeed, that "(n)ational policy, as expressed in the statute, requires that airlines and unions set up a procedure for settling grievances * * *" was accepted in the prevailing opinion

in the Court below. See 295 F.2d at p. 215; see also *Air Line Pilots Association* v. *Southern Airways, Inc.*, 49 LRRM 3145 (M.D. Tenn. 1962), *appeals docketed*, Nos. 15021, 15022, 6th Cir., May 17, 1962; *Air Line Pilots Association* v. *Southern Airways, Inc.*, Civil Aeronautics Board Docket No. 11654, Decision and Order No. E-18560 (July 5, 1962), *appeals docketed*, D. C. Cir. and 5th Cir., July 6, 1962.

Furthermore, it is clear that a holding that the Railway Labor Act requires that grievances of employees be heard through the machinery set up in Section 204 culminating in a board of adjustment accords with the overall policy embraced by Congress when it extended the provisions of the Railway Labor Act to carriers by air and their employees. This policy was to assure the safety of the traveling public by protecting pilots and other employees by means of the mandatory grievance machinery and the other provisions of the Railway Labor Act. The House Report recommending passage of the Bill that brought air carriers and their employees under the coverage of the Railway Labor Act stated:

> "During the past year there have been many terrible accidents on the air lines resulting in considerable loss of life. The greatest step that could possibly be taken to give greater safety to the air-traveling public would be to enact proper mediation legislation. It would insure against the dangers of pilot and copilot fatigue. It would, more than any other thing that could be done, assure against improper maintenance and inspection of equipment between flights. It will, to the greatest possible degree, assure a living wage to all airworkers and prevent sweatshop conditions. It does away with company unions and their dominance and gives the pilots and all other airworkers a clear, direct voice regarding the problems of piloting, maintenance, and inspection direct to their employer and to the regulatory agencies of the Government. This alone is the greatest possible single contribution that could be made in the interest of safety on the air lines of our

> country." See H. R. REP. No. 2243, 74th Cong., 2d Sess. p. 2-3 (1936).

Clearly, without a right to challenge an employer's disciplinary action through the grievance machinery established under the Act culminating in a board of adjustment and in the judicially enforceable decision of a neutral, pilots and other air workers would be in no position to exercise "a clear, direct voice regarding the problems of piloting, maintenance, and inspection * * *." It is therefore clear that Section 204 of the Railway Labor Act requires that grievances of employees be subject to review by boards of adjustment with the ultimate power to decide lodged in a neutral arbitrator whose decision is enforceable by the courts.

While the Court below recognized that the statute requires the establishment of adjustment boards it took the position that such boards were merely creatures of contract and that their jurisdiction was fixed by contract between the parties. The Court said:

> "* * * it is clear, therefore, that although the statute requires the parties to establish a board, without a contract there would be no board. It is also clear that the parties must look to the contract for the composition, procedures and jurisdiction (with Section 153) of an airline system board of adjustment." See 295 F. 2d at p. 211.

This view of the Court below is an erroneous one. The duty to establish a board of adjustment, like other duties imposed on carriers and unions under the Railway Labor Act, is enforceable by the exercise of the equity powers of the federal courts. See *Virginian Ry.* v. *System Federation No. 40*, 300 U. S. 515 (1937); *Texas & N. O. R.R.* v. *Clerks*, 281 U. S. 548 (1930); *Steele* v. *Louisville & Nashville R.R.*, 323 U. S. 192 (1944); *Railroad Trainmen* v. *Chicago River R.R.*, 353 U. S. 30 (1957).

And the jurisdiction of the boards of adjustment established pursuant to the mandate of Section 204 of the Act is

expressly stated in that section and in other sections of the Act. These boards are to have jurisdiction over

> "The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of the approval of this Act before the National Labor Relations Board. * * * " 49 Stat. 1189, 45 U. S. C. § 184.

It could not be otherwise if the purpose of Congress to enable air workers to contribute to the safety of the air traveling public by protecting them from unwarranted discipline was to be achieved. *See also* Railway Labor Act, § 2 ("to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements. * * * "); § 2, First ("all disputes, whether arising out of the application of such agreements or otherwise. * * * "); § 2, Sixth ("dispute * * * arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions. * * * "); § 3, First (i) ("the disputes * * * growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions. * * * ").

And this Court has recognized that grievances subject to adjustment under the Railway Labor Act may arise independently of the collective bargaining agreement. It said:

> " * * * It is to be doubted that Congress by the generally inclusive language used concerning grievances intended, for instance, to give the collective agent exclusive power to settle a grievance arising independently of the collective agreement, affecting only non union men to whose claim the union and the majority were hostile." See *Elgin, J. & E. Railway* v. *Burley*, 325 U. S. 711, 736, n. 34 (1945), *adhered to on rehearing*, 327 U. S. 661 (1946).

It is, therefore, clear that collective bargaining agreements between air carriers and the representatives of their employees and, in particular, those portions of the agreements providing for boards of adjustment for the determination of disputes arising out of grievances or out of the interpretation or application of the agreements are governed by the provisions of federal law. That the federal interest in collective bargaining between the air carriers and their employees was before Congress at the time it enacted Title II of the Railway Labor Act is evident from a report submitted to Congress by the then Federal Coordinator of Transportation, Joseph B. Eastman. The Conclusions and Recommendations of this report stated:

> "Beyond minimum safety standards, it is appropriate that matters involving rates of pay, hours, working conditions and grievances in the transportation industries be adjusted, so far as possible, by the orderly process of collective bargaining. This principle is widely recognized, particularly in industries strongly affected with a public interest. Air transportation presents no exception. The air lines have become an important part of the country's reliance for rapid transportation, whether of persons, mail, or valuable property. The public is interested in maintaining unhindered the flow of interstate commerce and the carriage of mail by air, and therefore in avoiding strikes, industrial disturbances, and friction between employer and employee. If wages and working conditions are matters primarily to be determined by agreement, the Government's obligation is to provide the best possible machinery for reaching and maintaining such agreements, as well as to mobilize the necessary factual data to facilitate the making of such agreements.
>
> • • •
>
> "The air-transport industry is so charged with responsibility to the public that it is important that every legal safeguard recommended by long experience in labor relations should be adopted. The value of the Railway Labor Act as a means for promoting wholesome labor relations is attested by the experi-

> ence under the act. Extension of the facilities of the Railway Labor Act to the air lines and their employees, as proposed in a bill passed by the Senate and now pending in the House of Representatives (S. 2496, 74th Cong.), is highly desirable." See *Hours, Wages and Working Conditions in Scheduled Air Transportation*, S. Doc. No. 208, 74th Cong., 2d Sess. pp. 81-82 (1936).

The compelling policy reasons for federal law governing the enforcement of collective bargaining agreements were recently stated by this Court in *Local 174, I. B. T.* v. *Lucas Flour Co.*, 369 U. S. 95, 103-104 (1962). These reasons apply with even greater force to collective bargaining agreements of air carriers.

The majority decision in the Court below recognized that

> "• • • [i]f any industry should have ready access to federal courts because of the interstate character of its business, it is the airline industry • • •." 295 F. 2d at p. 220.

But the majority believed that Congress had not provided for federal District Court jurisdiction over suits to enforce airline board of adjustment awards. It is true that there is no provision giving the District Courts jurisdiction specifically over such suits, but a specific provision is not required if the suit is one arising under the laws of the United States within 28 U. S. C. §§ 1331 and 1337.

It is respectfully submitted that suits to enforce airline board of adjustment awards are suits arising under the laws of the United States within 28 U. S. C. §§ 1331 and 1337. As has been shown above, it was the intent of Congress that Sections 203 and 204 of the Railway Labor Act as adopted, 45 U. S. C. §§ 183 and 184, should

> "not impair the effectiveness of the bill but simply make it apply with uniformity to both classes of employees • • •"

i.e., those engaged in air transport and those engaged in rail transport, *supra*, page 8. "Uniformity" was achieved and the "effectiveness" of Section 204 was insured by providing a federal forum for the enforcement of adjustment board awards.

Here, as in *Tunstall* v. *Brotherhood of Locomotive Firemen*, 323 U. S. 210 (1944), the federal nature of the collective bargaining agreement between air carriers and representatives of their employees and the extent to which this collective bargaining agreement is the result of the duties imposed on such carriers and their employees by the Railway Labor Act, make suits to enforce board of adjustment awards cases arising under the laws of the United States within 28 U. S. C. §§ 1331 and 1337. Indeed, such suits are based on a duty on "all carriers, their officers, agents and employees" expressed in Section 2, First of the Railway Labor Act, 45 U. S. C. Section 152, First. That section imposes the duty on carriers, including air carriers, and their employees,

> "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof." *

In every case, a refusal to comply with the award of a board of adjustment established pursuant to the mandates of Section 204 of the Act is a failure "to exert every reasonable effort to * * * maintain agreements * * * and

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* It should be noted that this language is much broader than the language in Sections 8(a)(5) and 8(b)(3) of the National Labor Relations Act which makes it an unfair labor practice for employers and labor organizations "to refuse to bargain collectively * * *." See 29 U. S. C. §§ 158(a)(5) and 158(b)(3).

to settle all disputes * * * " Thus, the power of the federal District Courts to enforce board of adjustment awards is only one aspect of the power of those courts to enforce the duties imposed by Section 2, First of the Railway Labor Act, 45 U. S. C. § 152, First. That, the federal District Courts have jurisdiction over suits to enforce these obligations is well settled. See cases cited on pages 5 and 10, *supra; Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 7180*, 69th Cong., 1st Sess. pages 84-85 (1926).

CONCLUSION

The judgment below should be reversed and the case remanded to the District Court.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 61

INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, R. K. DOUD, S. V. CORNSTUBBLE, O. L. BROOM, C. R. CASEY, P. R. DAVIS, and E. E. FUQUA, *Petitioners,*

vs.

CENTRAL AIRLINES, INC., *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S REPLY BRIEF

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners have filed a "Brief for Petitioners" which elaborates on and changes somewhat the arguments and contentions presented in the petition for certiorari but does not withdraw them. Therefore, this brief is directed at both the petition for certiorari and the Brief for Petitioners as well as the contentions made by the dissent in the Fifth Circuit opinion.

JURISDICTION

This case involves solely the question of the jurisdiction of the United States District Court for the Northern District of Texas. Hence, our attack is on

the jurisdiction of the District Court and not of the United States Supreme Court.

QUESTION PRESENTED

By Petitioners:

"Whether a suit to enforce an award of an airline system board of adjustment, created by requirement of the Railway Labor Act, presents a federal question that confers jurisdiction on a United States District Court."

By Respondent:

Whether a suit by an individual airline employee to enforce an award by an airline system board of adjustment is one which arises under the Constitution, laws and treaties of the United States.

STATEMENT OF THE CASE

This is a suit by six individual employees of Central Airlines, Inc., a certificated air carrier, each of whom filed a grievance claiming wrongful discharge and each of whom processed that grievance (with the union as its representative) through the grievance procedure provided in the contract between the employer and the union through the system board of adjustment, and each of whom received an award in his favor ordering reinstatement with lost wages. The International Association of Machinists is the bargaining representative of these employees, but it has no interest in this lawsuit; it is a "courtesy party" who is in this suit so that it may give each of the individual plaintiffs the benefit of its legal staff and its

experience. No grievance was filed by the union in its own behalf, and no award was rendered for the union's benefit. The defendants filed a motion to dismiss the union as neither a necessary nor a proper party, which was not acted on by the Court because the entire suit was dismissed.

Therefore, this suit stands in this Court in exactly the same fashion as though an individual employee of Central Airlines had filed a grievance which had been duly processed and had received an award from the system board of adjustment in his favor for reinstatement and back pay, less, of course, wages earned by him from other employers during the interim. The sole question before this Court is whether the United States District Court for the Northern District of Texas has jurisdiction to try a suit by such individual plaintiff to enforce his award which he received by virtue of the contract between the union and the airline. The union is no more a party in interest in this case than is the attorney who represents Central Airlines. It is Cornstubble's advocate, not a party in interest.

While no contention is made or, we take it, will be made that the defendant's answer can be looked to grant jurisdiction not given on the face of the complaint, we have no reason to deny that it is Central's position that the award is unenforceable for several reasons. The simplest one to state is that these employees, and each of them, were ordered to work overtime, and each of them refused to work overtime and refused to give any reason for their rejection of orders to work overtime. They were discharged for

refusal to work overtime and for refusal to give reasons for not working overtime. The award in this case specifically refused to pass on the right of the defendant to discharge Cornstubble and the other five for refusal to work overtime (R. 33). One of the reasons why the award is unenforceable grows out of that situation, since it is Central's position that when an employer discharges an employee for two or three reasons, a binding award would dispose of each of the reasons. To put it simply, A Company fires John Doe for murdering his foreman, burning down the plant, and for wearing a red tie to work. That discharge is submitted to an arbitrator, and he finds that wearing a red tie to work is not just grounds for discharge, and therefore says he need not pass upon the question of the murder of the foreman or the burning down of the plant, since there was one unsound reason for discharging John Doe. The award is attacked on other grounds, but none of the attacks is made on the basis of the validity of the contract under the Railway Labor Act nor on the basis that the System Board of Adjustment was not properly created under the terms of the Railway Labor Act, nor in any other way does the answer put in issue the validity or construction of the Railway Labor Act.

In the Trial Court the complaint predicated jurisdiction solely under 28 U.S.C.A. Sec. 1331, alleging that all of the six grievants' financial interests exceeded $10,000 in total and that the federal act involved was the Railway Labor Act. There is in this case no request for the right to amend, and of course no amendment to such complaint has been made. In

the Circuit Court, as its opinion shows, on oral argument the question was raised whether jurisdiction could be predicated on 28 U S.C.A. Sec. 1337 and on Section 301 of the Taft-Hartley Act. In the Circuit Court petitioners conceded that there was no jurisdiction under the Taft-Hartley Act, but their position in the Supreme Court of the United States seems to be that they now want to rely not only on 28 U.S.C.A. Sec. 1331, but also on 28 U.S.C.A. Sec. 1337, 45 U.S.C.A. Secs. 151-163, 45 U.S.C.A. Secs. 181-188, and the Labor Relations Act, 29 U.S.C.A. Secs. 141-144 and 29 U.S.C.A. Secs. 171-188. (See petition for writ of certiorari, page 2.) Not knowing to what extent the United States Supreme Court is going to limit its review of this case to the one presented to the Trial Court, and preferring to brief matters which should not be involved rather than to risk leaving contentions unanswered, respondent will deal with jurisdiction as argued by the petitioners. In doing so, however, respondent certainly does not waive its right to have the District Court's jurisdiction determined from the complaint presented to the District Court.

Since, as is obvious from the foregoing, the point presented is a narrow one, and whether it is phrased as we have above or whether it is phrased as the "question presented" in the petition for certiorari, the parties are reasonably close together in their u..derstanding of what was decided by the Trial Court and the Circuit Court. Therefore, we think it may be helpful to this Court to divide this brief into four sections, as follows:

FIRST SECTION

The complaint on its face claimed jurisdiction under 28 U.S.C.A. Sec. 1331 and failed to show that each of the individual plaintiffs had an amount in controversy in excess of $10,000; therefore, the judgment of the Trial Court was correct.

SECOND SECTION

Neither the Labor-Management Relations Act nor the Railway Adjustment Board Portion (28 U.S.C.A. Sec. 153) of the Railway Labor Act are applicable to a suit by an airline employee to enforce an award by a system board of adjustment.

THIRD SECTION

The Federal Law which gives jurisdiction under 28 U.S.C.A. Secs. 1331 and 1337 is Statutory Law and not Federal Common Law.

FOURTH SECTION

A suit by an airline employee to enforce an award in his favor granted by virtue of a contract between a union and the airline does not present a Federal question under either 28 U.S.C.A. Sec. 1331 or 28 U.S.C.A. Sec. 1337.

Respondent's brief on the merits will be presented under the foregoing divisions.

ARGUMENT ON THE MERITS

FIRST SECTION

The complaint on its face claimed jurisdiction under 28 U.S.C.A. Sec. 1331 and failed to show that each of the individual plaintiffs had an amount in controversy in excess of $10,000; therefore, the judgment of the Trial Court was correct.

Independent of the ground for dismissal discussed in the opinion of the Circuit Court, the Trial Court's judgment of dismissal must be sustained because the plaintiffs' complaint failed to comply with the requirement under 28 U.S. Code, Sec. 1331(a), that the amount in controversy as to each plaintiff exceed $10,000.

This was a suit to enforce six separate claims by the plaintiffs, Doud, Cornstubble, Broom, Casey, Davis and Fuqua, each of whom claimed wrongful discharge and each of whom filed a separate grievance (R-19). The award was made jointly because of the fact that the ground for discharge was common to the six, but each of such plaintiffs has a separate cause of action for his own re-instatement, and more particularly, each of them, insofar as the award allowed a recovery for lost wages, will have a separate claim in view of the fact that his actual earnings during the time he is off will reduce the recovery against the defendant. In short, the six plaintiffs' cause of action grew out of the same set of facts, but each has a separate cause of action and there is no joint cause of action. The allegations contained in the complaint for federal juris-

diction were (R-4):

> "As a result of defendants' failure, each individual plaintiff has suffered and will stand to suffer substantial damages, including loss of wages from the date of their wrongful discharge, all of which is shown in greater detail in the award attached hereto, as Exhibit B.
>
> "This Honorable Court has jurisdiction of this action under 28 U.S. Code § 131, this being a matter in controversy exceeding the sum and or value of $10,000, exclusive of interest and costs, and arises under the laws of the United States, specifically under the Railway Labor Act as set out more particularly hereinabove."

It is obvious that there is nothing in such complaint showing that each of the plaintiffs had a cause of action involving more than $10,000. The defendant makes no claim that this was raised in the Trial Court or that the Trial Court dismissed on this ground. However, unless the case of *Clark vs. Paul Gray*, 306 U.S. 583, 83 L.Ed. 1001, 59 S.Ct. 744, has been overruled or qualified, the raising of this point in the Trial Court was unnecessary. Additional cases might be added, but *Clark vs. Paul Gray* is also conclusive on the proposition here presented that allegations as quoted above by a number of plaintiffs is insufficient to confer jurisdiction under Section 1331, unless allegations are to the effect that each of such parties has involved an amount in excess of $10,000. As we say, additional cases might be added, but that case is directly in point, has not been qualified or overruled, and we deem it unnecessary to add thereto. Finally, of

course, as the record shows in this case, petitioners did not amend their complaint, either before or after the order of dismissal was entered, and have made no request therefor. In fairness to the Court we should also say that had a request to amend been made to add allegations that each individual plaintiff had a claim in excess of $10,000, we would have contested the good faith of such allegations based upon the testimony of each of the plaintiffs contained in oral depositions taken by the respondent.

Respondent respectfully submits that the judgment of the Trial Court denying jurisdiction was correct on this independent ground.

SECOND SECTION

Neither the Labor-Management Relations Act nor the Railway Adjustment Board Portion (28 U.S.C.A. Sec. 153) of the Railway Labor Act are applicable to a suit by an airline employee to enforce an award by a system board of adjustment.

As pointed out above, petitioners in the Trial Court claimed jurisdiction under 28 U.S.C.A. Sec. 1331(a) based solely upon the section of the Railway Labor Act authorizing the creation of system boards of adjustment by airlines and unions (28 U.S.C. Sec. 184).

However, during oral argument Judge Brown asked that jurisdiction under 28 U.S.C.A. Sec. 1337 be briefed as it applied to Sec. 301 of the National Labor Relations Act. Also, considerable argument has been made in the dissenting opinion and in petitioners' two briefs based on the railroad portion of the Railway

Labor Act (45 U.S.C.A. Secs. 151-163). (See petition for certiorari, page 2, and brief of petitioners, page 3, for example.) In fact, a large portion of the petition for certiorari, the Brief for Petitioners, and the amicus curiae filed herein argues that the question of jurisdiction in the United States District Court for an airline employee suing on an award is the same as that of an employee suing on an award under a contract to which the National Labor Relations Act is applicable or that of a railway employee suing on an award of the National Railway Adjustment Board. As a matter of fact, only 32 per cent of the Brief for Petitioners is devoted to what is really involved here, to-wit, a suit by an airline employee on an award by the system board of adjustment. It is true that on page 13 of the brief for petitioners the issue is met squarely and it is admitted that the "crucial inquiry" is whether or not there is jurisdiction under 28 U.S.C.A. Sec. 1331(a) because the case "arises" under 45 U.S.C.A. Sec. 184. However, that admission results in only the lesser portion of the brief being devoted to that issue, and rather than run the risk that we have failed to answer some of the contentions made, we want to deal briefly with Sec. 301 of the National Labor Relations Act and the railroad portion of the Railway Labor Act.

Petitioners did not claim jurisdiction under Section 301 of the Taft-Hartley Act in the Trial Court. The complaint filed is based solely on 45 U.S.C.A., Section 184. As a matter of fact, the petitioners have always conceded that even had they claimed, in the complaint, jurisdiction under Section 301 (29 U.S.C.A. 185),

said section could not be used to give the United States District Court jurisdiction of the cause. We cannot state the proposition better than petitioners did in their supplemental brief filed in the Circuit Court. We quote from the I.A.M. "Supplemental Brief for Appellants," page 12:

> "The inapplicability of Section 301 of the Taft-Hartley Act as illustrated by the following language in the statute wherein the definitions of employer and employee clearly exclude those covered by the Railway Labor Act:
>
> "Section 301 — jurisdiction is limited to 'Suits for violation of contracts between an *employer* and a labor *organization* representing employees in an industry effecting commerce *as defined in this Act* . . . .'
>
> * * *
>
> "Sec. 2(1) 'The term "*employer*" . . . shall not include . . . any person subject to the Railway Labor Act, as amended from time to time . . . .'
>
> * * *
>
> "Sec. 2(3) 'The term "employee" . . . shall not include . . . any individual employed by an employer subject to the Railway Labor Act, as amended from time to time . . . .'
>
> * * *
>
> "Sec. 2(5) 'The term "labor organization" means any organization of any kind, or any agency or *employee* representation committee or plan, in which *employees* participate and which exists for the purpose, in whole or in part, of dealing with *employers* concerning grievances, labor disputes, rates of pay, hours of employment, or conditions of work.' (Emphasis added)"

Petitioners' concession, as quoted above, is well advised, not only in the light of the language of the Act, but in the light of the language of this Court in *Local Union No. 25 vs. New York, N. H. & H. R. Co.*, 350 U.S. 155, 100 L.Ed. 166, 76 S.Ct. 227, wherein the Court said (350 U.S. 158):

> "The Act, in its definition of an 'employer,' expressly excludes anyone subject to the Railway Labor Act. 61 Stat 137, 29 USC § 152(2). It is of course true that employer-employee relationships of railroads such as respondent are governed by the Railway Labor Act, which was passed before either the National Labor Relations Act or the Labor Management Relations Act. Neither of the latter Acts was intended to tread upon the ground covered by the Railway Labor Act. It is clear that neither railroads nor their employees may carry their grievances with one another to the N.L.R.B. for resolution."

Therefore, had there been a claim asserted in the complaint filed in the District Court of jurisdiction based on Section 301, it could not be relied on. We will not leave this, however, without pointing out, as we shall again subsequently, that Congress clearly intended that airlines and their employees should be treated differently than those covered by Section 301. In other words, by excluding airlines and railroads from Section 301, Congress recognized that the carriers and their employees were "a different breed of cat" and that their labor agreements would be enforced differently.

In what has been said above with reference to Sec-

tion 301 of the Taft-Hartley Act, we have not overlooked the holding of this Court in *Association of Westinghouse Salaried Employees vs. Westinghouse Electric Corp.*, 348 U.S. 437, 99 L.Ed. 510, 75 S.Ct. 489, that Congress did not intend by enacting Section 301 "to open the doors of federal courts to a potential flood of grievances based upon an employer's failure to comply with the terms of a collective agreement relating to compensation and terms peculiar in the individual benefit which is their subject matter and which when violated give a cause of action to the individual employee." No analysis of the three majority opinions in the *Westinghouse* case by counsel could equal that of Judge Hastie in *United Steel Workers vs. Pullman-Standard Car Manufacturing Co.* (3rd Cir. cert. denied), 241 F. 2d 547. The cause of action asserted by Doud, Cornstubble, et al, the individual plaintiffs here, is certainly as individual to them as those dealt with in the *Westinghouse* and the *Pullman* cases.

We emphasize again here, as we said in the beginning, that the Machinists' Union is a "courtesy party" here and not a party in interest. The union had no award in its favor, and this is a suit by six individual employees, each to recover on his own grievance, which culminated in an award in his favor.

In addition to Section 301 of the Taft-Hartley Act, Judge Brown and petitioners give great weight to those provisions of the Railway Labor Act, which are expressly not applicable to airlines. (44 Stat. L. 577, as amended; 45 U.S.C.A. Sec. 151-163.) 45 U.S.C.A., Sec. 153, First, sec. (p) provides:

> "If the carrier does not comply with an order of a division of the Adjustment Board . . . the petitioner . . . may file in the District Court of the United States for the district in which he resides . . . . Such suit in the District Court of the United States shall proceed in all respects as other civil suits except that on the trial of such suit the findings and orders of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated . . . ."

The enforcement of awards by railroad employees, then, is expressly given to the United States District Court. The trouble is, of course, that Section 153, is not applicable to airlines (45 U.S.C.A. Secs. 181 and 184) until (Sec. 185) the National Mediation Board establishes "a permanent National Board of Adjustment." And, of course, no such National Board of Adjustment for airlines has been established.

The provision of the act making Section 153 not applicable to airlines is so clear that it needs neither argument nor authority. However, the exclusion is discussed in *National Airlines vs. Metcalf* (5th Cir. cert. denied) 271 F. 2d 817.

We therefore have a clear showing that Congress did not intend for an award by Central Airlines' System Board of Adjustment in favor of an employee named Cornstubble to be enforced in the federal courts under Section 301 of the Taft-Hartley Act. We also have a clear showing that Congress did not intend that that same award in favor of Cornstubble should be enforced by him in the federal courts under Section 153(p) of the Railway Labor Act. What petitioners

and Judge Brown in his dissenting opinion do is to say that, because Congress provided that Cornstubble's award is not enforceable in the federal court under Section 301, and because Congress provided that it is not enforceable in the federal courts under Section 153(p) of the Railway Labor Act, therefore Congress clearly intended that such award should be enforceable in the federal courts. This is strictly zero plus zero equals one. Two no's do not make a yes. The fact that Congress has clearly said that an airline employee's award from his System Board of Adjustment is not enforceable in the federal courts, under Section 301 or under the Railway Labor Act, means that Congress planned and expected that the award by a System Board of Adjustment to an airline employee would be handled differently and be enforced differently from the other two situations.

Petitioners, using Judge Brown's approach, make much of what they call a "paradox" in that airline awards are enforced in the state courts but railroad employee awards are enforced in the federal courts. There are many paradoxes in the Railway Labor Act. For example, a railroad employee who loses before the Railway Adjustment Board is through, and may not attack that award in the state or federal courts; but, by the very statutory scheme spoken of by the petitioners, the railroad against whom the award is made may attack same in the United States District Court. Such "paradox" did not prevent the enforcement of the statute as written in *Union Pacific Ry. Co. vs. Price*, 360 U.S. 601, 3 L.Ed. 2d 1460, 79 S.Ct. 1351.

Consistency has never been the hallmark of state and federal jurisdiction. It is certainly equally paradoxical that under 28 U.S.C.A. 1331 a citizen whose rights under a federal statute are worth $9,000 must litigate in the state court to enforce the rights given him by a federal statute, but that a citizen whose similar federal statutory rights have been violated to the extent of $11,000 may sue in the United States District Court. The paradox is inherent in our dual system of courts, and the answer, of course, to any argument of "paradox" is that the United States District Court is a court of limited jurisdiction and has only that jurisdiction given to it by Congress.

In solving this problem, we cannot for the life of us see what difference it makes why Congress treated airline employees and their awards differently, as far as jurisdiction is concerned, from railroad employees or employees of any other industry. What is important is that they were treated differently. As this Court very recently said, in *Sinclair Refining Co. vs. Atkinson*, 8 L.Ed. 2d 440:

> "In dealing with problems of interpretation and application of federal statutes, we have no power to change deliberate choices of legislative policy that Congress has made within its constitutional powers. Where congressional intent is discernible —and here it seems crystal clear—we must give effect to that intent."

If the congressional intent to treat airline employees and their awards from a System Board of Adjustment differently is clear, then whether such different treatment results from good reasons, bad reasons, or

no reasons would seem to be utterly unimportant. We can think of what seems to us to be an excellent reason for treating them differently. As the Airline Act (45 U.S.C.A. Secs. 181-188, and particularly Sections 184 and 185) clearly shows, Congress intended, to start with at least, that grievances should be handled differently on airlines than on railroads. It provided for only a System Board of Adjustment and clearly intended that the Mediation Board should see how that worked, and if it worked, then no National Airline Adjustment Board would be necessary. The obvious reason for such experimental period is that the Railway Adjustment Board is not such an unqualified success that Congress wanted to adopt that method for airline grievance settlement. So much is obvious from the express terms of the Act. And, if that is obvious from the Act, it certainly is a reasonable conclusion that Congress also was willing to experiment with state court enforcement on the similar theory that enforcement of railroad employee awards in the federal court had not been so successful as to demonstrate that that was the only tribunal to deal properly with them. The whole scheme for the handling of airline employee grievances is deliberately different. It is deliberately intended to be different. And, from such obvious intention of Congress for different handling, it is impossible to infer an intent for handling of airline awards in the same manner as those of railroad employees.

But, let us suppose that Congress had no reason. Let us suppose that Congress's failure to specify that the airline adjustment board awards were enforce-

able in the federal courts was a rank case of oversight. Can it be argued that "oversight" on the part of Congress creates federal jurisdiction? Are United States District Courts courts of general jurisdiction to which all causes of action may be brought unless there is an act of Congress specifically excluding their jurisdiction? The answer is that if there is anything well settled, it is well settled that the United States District Court is a court of limited jurisdiction having only jurisdiction when it is specifically given by statute. See, for example, *Kline vs. Burke Const. Co.*, 260 U.S. 226, 43 S.Ct. 79, 67 L.Ed. 226.

Petitioners attribute to Congress great fear of the state courts as the enforcers of federal statutes. No attempt is made to support the contention that Congress would be horrified if its statutes were construed and applied by state courts. Particularly here, no attempt is made to show a congressional fear of state courts as the vehicle for the protection of the rights of airline employees and airlines. Any contention that Congress (and this Court) must consider that state courts are incompetent to enforce and apply federal labor statutes is completely destroyed by the undoubted fact that even if the state court does not have exclusive jurisdiction it certainly has concurrent jurisdiction in this exact situation. See *Teamsters Union vs. Lucas Flour Co.*, 369 U.S. 95, 7 L.Ed. 2d 593; *Doud Box Co. vs. Courtney*, 368 U.S. 502, 7 L.Ed. 2d 483.

If the state court had jurisdiction of a suit by the employee to enforce the award or a suit by the airline to enjoin its enforcement, it is because Congress so intended. If the state courts are good enough to

have concurrent jurisdiction, obviously they are good enough to have enclusive jurisdiction. Lastly, if a state court were to misconstrue the rights of an employee (or an airline) on some matter which involved the federal statutes, then of course the United States Supreme Court has jurisdiction on certiorari from the state's highest court.

All of the foregoing may be unnecessary, for we believe that this Court will confine its decision to the issue of jurisdiction presented to the Trial Court, that is, whether under 28 U.S.C.A. Sec. 1331(a) this is a suit brought under a federal statute (45 U.S.C.A. Sec. 184) as set forth in the complaint.

THIRD SECTION

The Federal Law which gives jurisdiction under 28 U.S.C.A. Secs. 1331 and 1337 is Statutory Law and not Federal Common Law.

A large portion of the briefing done by petitioners here is devoted to an argument that it is not necessary to give a United States District Court jurisdiction in a non-diversity action for a federal statute to be directly involved. Petitioners say that all that is necessary is that some portion of the litigation could involve a question on which the federal common law is the binding rule of decision.

This is elaborated on in the Brief for Petitioners beginning on page 10, beginning on page 35, and again beginning on page 53. However, the essence of the argument is contained in the petition for certiorari, pages 3-12, and is stated concisely at the bottom

of page 7 of the petition for certiorari, wherein petitioners say:

> "Thus, federal law—call it federal common law, call it federal substantive law or call it simply law derived from the federal Railway Labor Act—already applies to determining the scope of the enforceability of these airline system board awards, thus the Supreme Court need not call for the fashioning of a new body of federal law. The federal law is there, it need only be applied. And federal courts certainly may enforce federal law, such law being derived from a federal statute."

The whole tenor of the argument is that a case, to give federal jurisdiction, "arises under the Constitution, laws or treaties of the United States" (28 U.S.C.A. Sec. 1331) or is a civil action "arising under any Act of Congress regulating commerce" (28 U.S.C.A. Sec. 1337), if the decisions of the United States Supreme Court are controlling. In short, "federal law" is the equivalent of "federal question," and jurisdiction may be predicated on rules and principles announced by this Court. To put it in blunt language: That an allegation that jurisdiction in the United States District Court was based upon "the decision of the Supreme Court in Roe vs. Doe, the plaintiff contending that the general rule as set out in that case is applicable, and the defendant contending that the exception to the general rule set out in that opinion is controlling, and the decision of the United States District Court as to whether the general rule or the exception is applicable will control the disposition of this case," would be sufficient under either Section 1331 or Section 1337.

To the contrary, we respectfully submit that both statutes refer to "laws," and that means statutes. Always heretofore to raise a "federal question" a United States statute had to be involved as distinct from a rule of law announced by this Court. For example, see:

Luckert vs. Delpark, 270 U.S. 496, 70 L.Ed. 703, 46 S.Ct. 397;
Becher vs. Contoure Laboratories, 279 U.S. 388, 73 L.Ed. 752, 49 S.Ct. 356;
Wells vs. Universal Pictures Co. (2nd Cir.) 166 F. 2d 690;
Eckert vs. Braun (7th Cir.), 155 F. 2d 517.

Certainly *Lincoln Mills*, (353 U.S. 448, 1 L.Ed. 2d 972, 77 S.Ct. 912), in stating that Section 301 gave it a mandate to create a body of substantive law, did not mean that the Supreme Court of the United States could create statutory law so as to come within either of the jurisdictional statutes. It would be stretching *Lincoln Mills* a long way to say that it construed Section 301 as delegating the legislative function to the Supreme Court.

This Court has described federal common law as being "law of independent federal decision" (*U.S. vs. Standard Oil*, 332 U.S. 301, 91 L.Ed. 2067, 67 S.Ct. 1604, at 332 U.S. 308). For simplicity we treat "federal common law" as being that realm of law in which the decisions of the United States Supreme Court are binding on both state and federal courts. In other words, if this Court has the last say as to what the law is, that is federal common law, There are many,

many instances where the state court has exclusive jurisdiction where a federal statute is involved, and if the state court misapplies that statute this Court would have final jurisdiction.

The one which would appear to be conclusive here relates to suits by railroad and airline employees for wrongful discharge. To make the application clear, Cornstubble, one of the plaintiffs here, was fired by Central Airlines. He then had a choice of filing suit for wrongful discharge based upon the terms of the contract between the union and the airline covering the terms of his employment, or, he could use that same contract, follow the grievance procedure therein set out, and ultimately go to arbitration, as set up in such union contract, which is the provisions for the system board of adjustment. If Cornstubble was successful and obtained an award, he could file suit on that award. If he filed suit for wrongful discharge, his suit is based on the contract between the union and the airline. If he follows the grievance procedure in the contract and then goes through the system board of adjustment and obtains an award, he files suit on the same contract. That is the same contract that the Railway Labor Act told Central Airlines and the union to enter into. That is the same contract provided for by the Railway Labor Act, and the Railway Labor Act regulates one cause of action exactly as much as it regulates the other.

This Court, in *Moore vs. Illinois Central R. Co.*, 312 U.S. 360, 85 L.Ed. 1089, 61 S.Ct. 754, *Slocum vs. Delaware L. & W. R. Co.*, 339 U.S. 239, 90 L.Ed. 795, 70 S.Ct. 577, and *Transcontinental & Western Air, Inc.*

vs. Koppal, 345 U.S. 653, 97 L.Ed. 1325, 73 S.Ct. 906, held that an employee, subject to the terms of the Railway Labor Act (whether railroad or airline worker), who has been discharged by his employer, has the option of following the grievance procedure set up by the employer-union contract and following it through to final arbitration if an airline and the Railway Adjustment Board if a railroad worker, or of treating the termination of his employment as final and filing suit for wrongful discharge. Those cases establish beyond the peradventure of a doubt that when the employee files suit for a wrongful discharge, his cause of action is governed and controlled by state law (see annotation, 61 A.L.R. 2d 911).

In *Moore, Slocum* and *Koppal* this Court has held that an airline employee who is wrongfully discharged can file suit against Central Airlines in the District Court of Tarrant County, Texas, to recover damages for that discharge, and that the law governing such cause of action will be that of the State of Texas. In that suit the cause of action would be based upon a breach of the union-company agreement. A suit for breach of a contract is nothing but a suit to enforce a contract. If the state courts have exclusive jurisdiction (diversity aside) of an action by an employee to recover for wrongful discharge under the contract they would surely have jurisdiction of the same cause of action by the employee to enforce another portion of the same contract between the airline and the union, to-wit, the arbitration provision. To put it another way, *Moore, Slocum* and *Koppal* dealt with contracts between the union and the railroad or airline which

an employee was seeking to enforce. There is no specific grant of jurisdiction to the federal court. Hence, it is a state court action. The union-company contracts in all of those three cases were entered into under the requirements of the Railway Labor Act. Yet, the mere fact that they were so entered into did not create a cause of action based on a federal statute; otherwise, enforcement of those contracts in the state court, under such terms as the state required, would not have been the holding of this Court.

To elaborate a little more on this same point, under 45 U.S.C.A. Sec. 153(p) there is a specific provision that an award of the Railway Adjustment Board, if not voluntarily complied with, can be enforced only by bringing in the United States District Court a suit which "shall proceed in all respects as other civil suits, except that on trial of such suit the findings and order of the Division of the Adjustment Board shall be prima facie evidence of all the facts therein stated." Therefore, there being a specific grant of jurisdiction to the United States District Court of an award from the Railway Adjustment Board, there is federal court jurisdiction. But, there being nothing in the Act to cover the jurisdiction of a suit by an employee to enforce the same contract by recovering damages for wrongful discharge, such action is exclusively in the state court. So here, since Section 153(p) is specifically not applicable to the Airline Adjustment Board, the same reasoning and the same conclusion would force a decision that an action to enforce or prevent the enforcement of an award by an Airline Adjust-

ment Board would likewise be on the same contract and exclusively of state court jurisdiction.

Another section of the Railway Labor Act is the Safety Appliance Act (45 U.S.C.A. Sec. 1 et seq.). Of course, if an employee is injured because of a safety appliance defect, he has the choice of filing suit in the state or federal court because the statute expressly says that such suit may be filed in either the state or federal court. However, if a passenger on a train or a traveler on the highway, or other non-employee to whom the statute specifically giving state and federal concurrent jurisdiction does not apply, files such a suit, the state court has exclusive jurisdiction. That is the direct holding of *Jacobsen vs. N.Y. N. H. & H. R. Co.* (1st Cir.) 206 F. 2d 153, affirmed by this Court 347 U.S. 909, 74 S.Ct. 474, 98 L.Ed. 1067. See also *Anderson vs. Bingham & Garfield R. Co.* (10th Cir.) 169 F. 2d 328, and *Bernstein vs. D. & R. G. Ry. Co.* (10th Cir.) 193 F. 2d 441.

The lower federal courts have many, many times dealt with this problem, involving many many types of actions where various federal statutes were involved. In each of these cases, if a state court had misapplied the federal statute involved, the United States Supreme Court would have had jurisdiction on certiorari. But in each of these cases the holding was that there was exclusive state court jurisdiction. For example, see:

Brouk vs. Managed Funds, Inc. (8th Cir.) 286 F. 2d 901, cert. dism. (Securities Act);

Myer vs. Kansas City Southern Ry. (2nd Cir.)

84 F. 2d 411 (stockholders' derivative action for conspiracy against railroad's and directors' alleged violation of the antitrust laws);

Consolidated Freight Ways vs. United Truck Lines (9th Cir.) 216 F. 2d 543 (violation of the Motor Carrier Act);

Miller vs. Long (4th Cir.) 152 F. 2d 196 (violation of the National Housing Act;

Republic Pictures Corp. vs. Securities First National Bank (9th Cir.) 197 F. 2d 767 (involving the copyright law);

Shelby County vs. Fairway Homes, Inc. (6th Cir.—cert. denied) 285 F. 2d 617 (Defense Housing Act).

Windsor vs. United Airlines, 159 F. Supp. 856 (Warsaw Convention);

Dennis vs. Southeastern Aviation, Inc., 176 F. Supp. 543 (violation of the Civil Aeronautics Act).

Illustrations might be multiplied, but what is important here is to demonstrate that even though the decisions of this Court may be final and binding in the ultimate outcome of litigation predicated upon or involving federal statutes, that is not sufficient to give district court jurisdiction initially.

In each of the above instances, particularly those under the Railway Labor Act, a federal statute was at least as closely involved as it is here. In each of those cases, had a state court wrongly interpreted a federal statute or incorrectly applied it, this Court would have jurisdiction on certiorari. But in each of

those cases the exclusive initial jurisdiction was in the state court and not in the United States District Court. In each of those cases, insofar as the federal statute referred to was concerned, the decisions of the United States Supreme Court would be final and establish the "federal law." In each of those cases the jurisdiction of the United States District Court was denied in the absence of diversity.

This section of the brief, as is obvious from its content, is presented in answer to all of the contentions made by the petitioners in their Brief for Petitioners except those relating to jurisdiction claimed under 45 U.S.C.A. Sec. 184, the airline adjustment board statute.

Also, the authorities above cited are authority for the argument that Section 184 is not the basis for plaintiffs' cause of action, because in each case a federal statute was as much, and in some instances much more, directly involved than Section 184 is involved in this case. In the interest of saving space, we ask the Court to consider the foregoing authorities as supplemental (by way of analogy) to the cases hereafter presented in the Fourth Section of this brief directed to the real question here.

We respectfully submit that the complaint in this case fails to show that the plaintiffs' right to recover will be given or denied depending upon the construction or application of a federal statute; and further, that if "federal law" controls the rights of the parties, it is "federal decisional law" and not federal statutory law.

FOURTH SECTION

A suit by an airline employee to enforce an award in his favor granted by virtue of a contract between a union and the airline does not present a Federal question under either 28 U.S.C.A. Sec. 1331 or 28 U.S.C.A. Sec. 1337.

This was not a diversity case, and the Circuit Court in this case held that this suit did not arise under a federal law or an act regulating commerce, so as to give the District Court jurisdiction under either 28 U.S.C.A. Sec. 1331 or 28 U.S.C.A. Sec. 1337. We have heretofore pointed out that plaintiff relied solely on Section 1331 in the Trial Court, but since the test of what "arises" is the same under Section 1331 and Section 1337, we will brief them both under this section.

In many places, and in innumerable authorities, the various tests for "arises under" have been stated, and in a number of places the authorities have been collected. The shortest statement of all of the principles is contained in the following quotation from 14 *A.L.R.* 2d at page 1003:

> "With respect to basic principles and tests of jurisdiction, it should be kept in mind whether original or removal jurisdiction is sought to be invoked, that (1) Federal courts are courts of limited jurisdiction and examine on their own motion into the question whether they may take, hear, and decide a case; (2) the right claimed must be one which will succeed on one construction of the laws of the United States but will fail on another; (3) there must be a necessity for

> construction of a Federal statute or statutes and a real and genuine dispute or controversy between the parties as to the meaning and effect of a Federal law asserted to be involved; (4) the asserted Federal question must be real, substantial, and meritorious, not frivolous or a well-settled question foreclosed by previous court decisions; (5) the right itself must be Federal in its nature and not merely in its source or origin; (6) presentation of a Federal question must be determined from plaintiff's statement of his own cause of action, of which the claimed Federal right must be an essential element; (7) matters pleaded by plaintiff in anticipation or avoidance of defenses, or matters appearing in such pleadings subsequent to plaintiff's complaint as defendant's answer or petition for removal (or plaintiff's reply, under practice permitting its filing) are entirely immaterial and cannot be considered in determining whether a Federal question is presented."

The cases supporting the seven requirements are collected in that annotation and in an earlier annotation, 12 *A.L.R.* 2d, p. 8 et seq.

The latest statement by this Court which we have found, covering the principles applied by the Circuit Court in this case, is contained in the following quotations from *Pan American Petroleum Corp. vs. Superior Court*, 366 U.S. 656, 6 L.Ed. 584, 81 S.Ct. 1303:

> "It is a settled doctrine that a case is not cognizable in a federal trial court, in the absence of diversity of citizenship, unless it appears from the face of the complaint that determination of the suit depends upon a question of federal law. See, e.g., Skelly Oil Co. v. Phillips Petroleum Co.

339 US 667, 672, 94 L ed 1194, 1200 70 S Ct 876, and cases cited. Apart from diversity jurisdiction, 'a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. . . . and the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal. . . .' Gully v. First Nat. Bank, 299 US 109, 112, 113, 81 L ed 70-72, 57 S Ct 96.

"For this requirement it is no substitute that the defendant is almost certain to raise a federal defense. See Skelly Oil Co. v. Phillips Petroleum Co. and Gully v. First Nat. Bank both (US) supra, and authorities cited in those cases."

* * *

"The rights as asserted by Cities Service are traditional common-law claims. They do not lose their character because it is common knowledge that there exists a scheme of federal regulation of interstate transmission of natural gas. What was said in Gully v. First Nat. Bank, 299 US, at 116, is apposite:"

" 'We recur to the test announced in Puerto Rico v. Russell & Co., supra: "The federal nature of the right to be established is decisive—not the source of the authority to establish it." ' "

* * *

"We are not called upon to decide the extent to which the Natural Gas Act reinforces or abrogates the private contract rights here in controversy. The fact that Cities Service sues in contract or quasi-contract, not the ultimate validity of its arguments, is decisive."

* * *

> "Petitioners contend that to permit the state courts to entertain the suits brought by Cities Service will jeopardize the uniform system of regulation that Congress established through the Natural Gas Act. Apart from other considerations that dispel such fears, it should be remembered that the route to review by this Court is open to parties aggrieved by adverse state-court decisions of federal questions."

The rules announced in the *Pan American* case above quoted are not new, and so that we may be, as much as possible, on common ground with the petitioners, we will take the cases they prefer for the announcement of this rule (Brief for Petitioners, pp. 39 and 40), that is, *Gully*, *Shulthis*, and *Russel*, quoting from them. In *Gully vs. First National Bank*, 229 U.S. 109, 57 S.Ct. 96, 81 L.Ed. 70, this Court said:

> "Federal jurisdiction may be invoked to vindicate a right or privilege claimed under a federal statute. It may not be invoked where the right asserted is non-federal, merely because the plaintiff's right to sue is derived from federal law, or because the property involved was obtained under federal statute. The federal nature of the right to be established is decisive. To bring a case within (28 U.S.C. 1331(a)), a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one of the plaintiff's cause of action."

In *Shulthis vs. McDougal*, 225 U.S. 561 (p. 569), 32 S.Ct. 704, 56 L.Ed. 1205, it was said:

> "A suit to enforce a right which takes its origin in the laws of the United States is not necessarily,

> or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of such a law, upon the determination of which the result depends."

And in *People of Puerto Rico vs. Russell & Co.*, 288 U.S. 476, 77 L.Ed. 903, 53 S.Ct. 447, quoting from 288 U.S. at page 483:

> "For we think that even though petitioner derived its authority to maintain the suit from the Act of Congress, it did not arise under the law of the United States within the meaning of the jurisdictional statutes.
>
> "The suit was brought to recover assessments levied under the Act of the Puerto Rican legislature, but not to enforce a right created by a law of the United States. No question of interpretation or enforcement of the federal statute appears upon the face of the complaint. Federal jurisdiction may be invoked to vindicate a right or privilege claimed under a federal statute. It may not be invoked where the right asserted is non-federal merely because the plaintiff's right to sue is derived from federal law, or because the property involved was obtained under federal statute. The federal nature of the right to be established is decisive—not the source of the authority to establish it. Shoshone Min. Co. v. Rutter, 177 U.S. 505, 44 L.ed. 864, 20 S.Ct. 726; Blackburn v. Portland Gold Min. Co., 175 U.S. 571, 44 L.ed. 276, 20 S.Ct. 222, 20 Mor. Min. Rep. 358; Little York Gold-Washing & Water Co. v. Keyes, 96 U.S. 199, 203, 24 L.ed. 656, 658."

We therefore look to the complaint in this case (R. 1-5) to see what plaintiffs alleged. The first three paragraphs merely give the names of the parties and their residence. Paragraphs 4, 5 and 6 allege that the company and the union entered into a contract "in accordance with statutory requirement (45 U.S. Code § 184), established a board of adjustment of jurisdiction which may be lawfully exercised by system, group or regional boards of adjustment, under the authority of Section 3, Title I of the Railway Labor Act (45 U.S. Code § 153)." Paragraph 8 (there is no Paragraph 7) alleges that such system board handed down awards in favor of Cornstubble, Doud, Broom, Casey, Davis and Fuqua on November 3, 1959 (Paragraph 9), a correct copy of which award was attached as Exhibit B to the complaint. Paragraph 10 says the defendant failed to comply with the award, and plaintiffs then allege:

"11.

"As a result of defendants' failure, each individual plaintiff has suffered and will stand to suffer substantial damages, including loss of wages from the date of their wrongful discharge, all of which is shown in greater detail in the award attached hereto, as Exhibit B.

"12.

"This Honorable Court has jurisdiction of this action under 28 U.S. Code, §1331, this being a matter in controversy exceeding the sum and or value of $10,000, exclusive of interest and costs, and arises under the laws of the United States, specifically under the Railway Labor Act as set out more particularly hereinabove."

The award itself does not apply the Railway Labor Act, it does not construe the Railway Labor Act; as a matter of fact, it does not even mention the Railway Labor Act by name or by citation, nor is the Railway Labor Act involved even by inference in the award.

Now, applying the first principle recognized by the courts as necessary to determine federal district court jurisdiction, what kind of lawsuit is this?

It is, of course, an action on a contract. There was a contract between the union and the company, of which the union members were either parties or beneficiaries, and the suit is one to enforce that contract. We do not think the petitioners will deny this, but to be orthodox we quote 3 *Am. Jur.* "Arbitration and Award" Sec. 154, p. 972:

> "§ 154. Generally.—It has been authoritatively stated that the entire proceedings of arbitration and award merely constitute a contract between the parties. At the time of the submission they agree to do what shall be awarded; and when the award is made, it is read into the original agreement. In accordance with this view, at common law the successful party can enforce the award only in the same manner as he can enforce an ordinary contract, with the added advantage that the award may be introduced in evidence and is conclusive as to the matters therein decided in so far as they are within the terms of the submission."

See also *Kentucky River Mills vs. Jackson* (6th Cir. cert. denied) 206 F. 2d 111, and *In Re Southern Pac. Co.* (D.C.) 155 F. 1001.

What we want to argue is that this was an action for breach of contract as set forth in the complaint, not an action to enforce a federal statute nor one, as far as the complaint shows, which will turn upon the construction or application of a federal statute. To use the language we have already quoted above from *Pan American:*

> "The fact that Cities Service sues in contract or quasi-contract, not the ultimate validity of its arguments, is decisive."

In addition to the decision by the Fifth Circuit in this case and in *National Airlines vs. Metcalf*, 271 F. 2d 817, this same question has been decided by the Circuit Court of Appeals and by the District Court a large number of times. The first case we want to call the Court's attention to is *Duplisea vs. Main Central Ry.* (1st Cir.-cert. denied) 260 F. 2d 495, where in disposing of this identical question the Circuit Court said:

> "The complaint is conveniently vague as to the basis of federal jurisdiction . . . Nor is there any allegation of a breach of a duty imposed or the violation of a right given by the Constitution, the Railway Labor Act, or any other federal statute . . . . Nor does the complaint raise any question as to the validity, construction, or effect of the Constitution or of any law of the United States. On the contrary under the terms of the complaint, plaintiff seeks damages for an alleged wrongful discharge in violation of the terms of a collective bargaining agreement negotiated by the Railroad and the Brotherhood of Railroad Trainmen under the provisions of the Railway Labor Act."

Certainly every word said there is applicable to the complaint in this lawsuit.

The second case is *Amalgamated Ass'n of Street, etc., Employees vs. Southern Bus Lines* (5th Cir.-cert. denied), 189 F. 2d 619, where in disposing of the same jurisdictional question but under a different statute the Circuit Court said:

> "Upon the allegations of the complaint, we think it clear that the court below did not have jurisdiction over this controversy. No facts are alleged upon which the conclusion can legitimately be based that the District Court independently of the arbitration agreement would have jurisdiction of the 'subject matter of a suit arising out of the controversy between the parties' as required by Section 4 of the Federal Arbitration Act, 9 U.S.C.A., Par. 4 . . . .Viewing the base at bar against this background of established principle, we do not find in it the elements of federal jurisdiction. *What is here involved in merely a controversy between the parties as to the construction of a contract which allegedly arises out of the laws of the United States respecting collective bargains between employer and employees in interstate commerce; but the right of action asserted does not arise out of those laws but only arises from the subsequent contractual relations of the parties.* The wrongful breach of such relations does not confer federal court jurisdiction unless there is diverse citizenship." (Italics ours.)

Again we say, not only is the holding of the Court in the case above quoted from directly in point, but the language is just as applicable to the complaint in

this case as it was to the complaint presented in that case.

Plaintiffs claim no statutory right to reinstatement. Plaintiffs claim no statutory right to damages for the difference between the wages they would have earned and what they actually earned in other employment. What we are trying to say has been better said by the courts. For example, we quote from *Starke vs. N.Y., C. & St. L. R. Co.* (7th Cir.) 180 F. 2d 569:

> "Any plausibility in plaintiff's contention arising from a literal reading of the section relied upon has been, in our judgment, entirely dissipated by a long line of court decisions construing the history, the purpose and the rights created by the Railway Labor Act. It is plain that the wrong of which plaintiff complains, that is, the impairment of his seniority rights, stems entirely from an agreement entered into in conformity with the requirements of the Act between plaintiff's bargaining agent and the defendant. Plaintiff has no statutory or constitutional right to seniority. Such right exists solely by reason of the contract. Hence his right is not one which 'involves a dispute or controversy respecting the validity, construction, or effect of such a law, upon the determination of which the result depends.' Shulthis v. McDougal, 225 U.S. 561, 569, 32 S.Ct. 704, 706, 56 L.Ed. 1205. See also Gully v. First National Bank, 299 U.S. 109, 112, 57 S.Ct. 96, 81 L.Ed. 70."

Or, as was said in *Hettenbaugh vs. Airline Pilots Ass'n International* (5th Cir.), 189 F. 2d 319, quoting from page 321:

> "There is no allegation here that the bargaining agreement between the parties discriminated against the appellants. At most, there is an allegation of a breach of the bargaining agreement. Any right of action, if one exists, is based on the alleged breach of the bargaining agreement, and does not arise under the Railway Labor Act, but only from the consequent contractual relations of the parties. The federal courts are not charged by federal law with the duty of policing parties in the performance of collective bargaining agreements entered into pursuant to the Railway Labor Act. See Hayes v. Union Pac. R. Co., 9 Cir., 184 F. 2d 337."

Or, as was said in *Barnhart vs. Western Maryland Ry. Co.* (4th Cir.-cert. denied), 128 F. 2d 709, at page 713:

> "What is here involved is merely a controversy between the parties over an alleged wrongful discharge of the plaintiffs from employment existing after the passage of an Act of Congress, and possibly affected as to some of its working conditions by the published decisions of the Labor Board; but the right of action asserted does not arise from any provision of the statute, and the determination of the controversy does not depend upon any disputed validity, construction or effect of the statute. In other words, the employment may have been inspired by the Act, but a right of action for the defendant's alleged breach of the contract does not arise from the Act; but only from the subsequent contractual relations of the parties. The wrongful breach of such relations does not confer federal court jurisdiction unless there is diverse citizenship."

A district judge, in *Air Line Dispatchers Ass'n vs. California Eastern Airways, Inc.*, 127 F. Supp. 521, p. 524, said:

> "Portions of the Railway Labor Act, 45 U.S.C.A. §§ 151, 152, 154, 163, enjoin upon the owners and their employees the duty to *make* and *maintain* agreements covering rates of pay, rules and working conditions. But a suit to enforce a right which has its origin in the laws of the United States is not for that reason alone within the federal jurisdiction. For suit to 'arise under Act of Congress' it must involve a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends. Shulthis v. McDougal, 1912, 225 U.S. 561, 32 S.Ct. 704, 56 L.Ed. 1205; Gully v. First National Bank, 1936, 229 U.S. 109, 57 S.Ct. 96, 81 L.Ed. 70; Marshall v. Desert Properties, 9 Cir., 1939, 103 F. 2d 551.
>
> "The complaint here alleges a breach of the agreement. The employment and the agreement may have been inspired by the Act but the right of action does not arise from the Act but only from the consequent contractual relations of the parties. Such a breach does not confer jurisdiction upon the Federal Court. Barnhart v. Western Maryland Ry. Co., 4 Cir., 1942, 128 F. 2d 709; Strawser v. Reading Co., D.C.E.D. Pa. 1948, 80 F. Supp. 455; Hayes v. Union Pac. R. Co., 9 Cir., 1950, 184 F. 2d 337, affirming D.C.N.D.Cal. 1950, 88 F. Supp. 108; Starke v. New York, Chicago & St. Louis R. Co., 7 Cir., 1950, 180 F. 2d 569; Burke v. Union Pac. R. Co., 10 Cir., 1942, 129 F. 2d 844."

We can add to the citations of authorities, but pri-

marily we want them to say in the court's language what we are trying to say. Plaintiffs here sued to get reinstatement and for damages. There is nowhere in the complaint or in any brief filed a statement that there is any statute that entitles the plaintiffs to reinstatement or to damages. There is no such statement because there is no such statute. The plaintiffs have a lawsuit, if they have any, because of a contract, and this is nothing but a suit to enforce a contract.

As we have heretofore pointed out, the award on which suit is brought does not quote the Railway Labor Act, does not cite the Railway Labor Act, and as a matter of fact does not mention it. The award is based solely on the contract. The contract, which was attached to the petition (R. 6), recites (Par. 3(b)):

> "In compliance with Section 204, Title II of the Railway Labor Act, as amended, there is hereby established a system board of adjustment for the purpose of adjusting and deciding disputes which may arise under the terms of the Mechanics' Agreement and any amendments or additions thereto" etc.

Section 204, referred to, is 45 U.S.C.A., Sec. 184, and it provides the only language in the entire Railway Labor Act that is applicable to the matter now before this Court. That language is:

> "It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of sections 181-188 of this title, to establish a board of adjustment of jurisdiction not exceeding the

jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 153 of this title."

There is nothing in the above language (and nothing anywhere else in the Act) that describes or provides for what such contract for arbitration or adjustment shall contain. It has a maximum, in that such board of adjustment cannot exceed in jurisdiction or authority the boards provided for under Section 153, but what else such agreement may contain is left entirely to the contract between the parties. We take it that the agreement of the parties could not make the award of such an adjustment board more final than one by the Railway Adjustment Board, but they could make it less final; they could not give it more jurisdiction than the boards for railroads, but they could give it less jurisdiction: they could provide for almost any type of adjustment or arbitration, could set up any form of procedure, could provide for submission solely on the record, or could provide for hearing additional evidence; they could provide for a permanent neutral, or they could provide for the selection of a neutral from a source other than the mediation board: they could, in short, put anything in it that they chose to after negotiations.

This Court, with reference to the railway section of the Railway Labor Act, stated in *Terminal Ry. Ass'n vs. Brotherhood of Ry. Trainmen*, 318 U.S. 1, 87 L.Ed. 571, 63 S.Ct. 420, quoting from 318 U.S. at page 6:

"The Railway Labor Act, like the National Labor

> Relations Act, does not undertake governmental regulation of wages, hours, or working conditions. Instead it seeks to provide a means by which agreement may be reached with respect to them. The national interest expressed by those Acts is not primarily in the working conditions as such. So far as the Act itself is concerned these conditions may be as bad as the employees will tolerate or be made as good as they can bargain for. The Act does not fix and does not authorize anyone to fix generally applicable standards for working conditions. The federal interest that is fostered is to see that disagreement about conditions does not reach the point of interfering with interstate commerce. The Mediation Board and Adjustment Board act to compose differences that threaten continuity of work, not to remove conditions that threaten the health or safety of workers. Cf. Pennsylvania R. Co. v. United States R. Labor Bd. 261 US 72, 67 L ed 536, 542, 43 S.Ct. 278."

The above language is certainly equally applicable to Section 184, above quoted. Paraphrasing, it can aptly be said here:

> "So far as the Act itself is concerned, these adjustment agreements may be as bad as the parties will tolerate or be made as good as they can bargain for. The Act does not fix and does not authorize anyone to fix generally applicable standards for such adjustment agreements."

Let us point out a misstatement repeated throughout petitioners' brief. Petitioners insist that it was the intent of Congress that the system board of adjustment for airlines should be exactly like that of

the National Railway Adjustment Board (Brief for Petitioners, pp. 11, 44 and 47, for example). To the contrary, Section 184 provides that the parties shall "establish a board of adjustment of jurisdiction *not exceeding* the jurisdiction which may be lawfully exercised by system, group" etc. How petitioners can get "not exceeding" to be synonymous with "exactly like" we do not know. Nor do they suggest any reason.

The real issue in this case, of course, is whether Cornstubble has a cause of action by reason of a federal statute. To put it in question form, "What part of what federal statute gives Cornstubble a cause of action for reinstatement or for damages?" This is the essence of the issue before this Court. This is the "crucial issue" (Brief for Petitioners, p. 13). Does Cornstubble's cause of action arise from the contract or does it arise from the statute? If the contract gives him a cause of action, does the statute take it away? If the contract denies him a cause of action, does the statute give it to him? In short, is his cause of action contractual or statutory?

We can approach this from a slightly different angle to illustrate the fact that there is no federal statute involved. This is a lawsuit, as we have said, by Cornstubble to recover a judgment ordering his reinstatement and for money damages. The defendant has the right to tender him employment and have tried only the issue of damages under the contract and under the award. In that case then, the only thing that would be involved would be how much Cornstubble would

have earned had he not been fired and how much he has earned in other employment. The Trial Court determines those two facts and renders judgment. What federal statute is involved? What federal question is involved? Where is your federal jurisdiction?

The case is tried on the question of whether or not the arbitrator had been bribed, and the Court submits to the jury the question and the jury finds on sufficient evidence that the arbitrator had been bribed, and therefore holds the award void. Where is the statute which determines whether the plaintiff or the defendant recovers? Where is the federal question?

Suppose the Trial Court holds that under the contract between the union and the company the arbitrator had to pass on the right of the airline to fire Cornstubble for refusal to work overtime. As we have heretofore pointed out, Cornstubble was fired both because he refused to work overtime and because he refused to give a reason for his refusal to work overtime. As we have heretofore pointed out, the arbitrator specifically (R. 33) refused to pass on the right of the defendant to discharge Cornstubble for failure to work overtime. If the Court holds that under the contract the arbitrator had to pass on both reasons for discharge, which statute passed by Congress is involved?

Each one of these questions we are asking could be raised only by the defensive pleading, and not even those questions are presented by the complaint in this case.

Perhaps we can wind up this section of the brief

with a paraphrase of this Court's opinion in *Pan American Petroleum Corp. vs. Superior Court*, quoted heretofore, wherein the Court said:

> "The rights as asserted by Cities Service are traditional common-law claims. They do not lose their character because it is common knowledge that there exists a scheme of federal regulation of interstate transmission of natural gas.
>
> * * *
>
> "We are not called upon to decide the extent to which the Natural Gas Act reinforces or abrogates the private contract rights here in controversy. The fact that Cities Service sues in contract or quasi-contract, not the ultimate validity of its arguments, is decisive."

We paraphrase that to say:

> "The rights as asserted by Cornstubble are traditional common-law claims. They do not lose their character because it is common knowledge that there exists a scheme of federal regulation of employer-employee relationships.
>
> * * *
>
> "We are not called upon to decide the extent to which the Railway Labor Act reinforces or abrogates the private contract rights here in controversy. The fact that Cornstubble sues in contract or quasi-contract, not the ultimate validity of his arguments, is decisive."

We respectfully submit that the judgment of the Trial Court and the Circuit Court is correct and that in this particular case the United States District Court did not have jurisdiction.

Before concluding this brief, we want to apologize because we have not been able to better collate this brief to the "Brief for Petitioners." We would like to blame this on petitioners' brief and not on our own lack of ability, because it seems to us that petitioners have said the same thing in so many different ways that they have not made a series of contentions in logical order but the same two contentions repeated over and over again. Having that view, the divisions of this brief are, we think, an answer to every contention made.

Petitioners and amicus curiae have referred to the Congressional Record and have made one or two quotations from the Record. Nothing quoted or cited deals with the question presented by the complaint in this case. Nothing quoted or referred to deals with jurisdiction of the United States District Court. We have not read the Congressional Record. The statute is too plain to justify an excursion into the Congressional Record. We have the very strong feeling that the Congressional Record should be resorted to only in a case of dire necessity, and assume that petitioners were in dire necessity or they would not have used such inapposite quotations and references. Anyway, what was said in the *Sinclair* case, which we have heretofore quoted, and what was said in *Caminetti vs. United States*, 242 U.S. 470, 61 L.Ed. 442, 37 S.Ct. 192, takes care of the situation. Quoting from *Caminetti:*

> "In other words, the language being plain, and not leading to absurd or wholly impracticable con-

sequences, it is the sole evidence of the ultimate legislative intent."

We respectfully submit that the judgment of the Trial Court and the Circuit Court should be affirmed.

SUMMARY OF ARGUMENT

FIRST SECTION

It is here argued that the judgment of the Trial Court is correct, irrespective of the point actually decided by the Circuit Court, because plaintiffs' complaint was in effect a separate lawsuit by six people, and there was no allegation that as to each more than $10,000 was involved.

SECOND SECTION

Congress has explicitly excluded suits by airline employees from the terms and provisions of Section 301 of the National Labor Relations Act, and jurisdiction based on Section 301 cannot be the basis for jurisdiction here. Similarly, an award in favor of an airline employee is expressly not within the terms of the railroad portion of the Railway Labor Act (45 U.S.C.A. Sec. 153(p)) and thereby Congress likewise evidences its intent that no federal court jurisdiction was intended. Respondent argues that the exclusion of airline employee awards from Sections 301 and 153(p) evidences a congressional intent that awards by airline employees should be handled differently and enforced differently, thereby supporting the judgment of the lower court that, unlike awards in favor of railroad employees where there is specific grant of

federal court jurisdiction, and unlike awards to which Section 301 of the National Labor Relations Act is applicable where there is a specific grant of federal court jurisdiction, there is no grant of federal court jurisdiction applicable to the award in this case.

THIRD SECTION

This section is respondent's answer to petitioners' contention that if federal law (federal common law) is applicable to the cause of action asserted, then a federal question is presented. Respondent contends that federal law, to give a district court jurisdiction, means federal statutory law, and that even if the federal rule of decision could control questions which might be raised in the trial of the case, there is no district court jurisdiction unless the plaintiffs' complaint shows that their cause of action is based upon a federal statute. Respondent in this section also cites and discusses numerous instances where, under the Railway Labor Act and other federal statutes, the "federal rule of decision" can control the final disposition but in which there is no federal primary jurisdiction in the district court because the suit is not brought to enforce a federal statute nor does the construction or interpretation of a federal statute necessarily determine the outcome of the case.

FOURTH SECTION

This is the section where the respondent briefs and argues the primary issue before the Court, which is whether or not this suit is one which "arises" under 45 U.S.C.A. Sec. 184, the Railway Labor Statute,

which requires that airlines and the union representing their employees must enter into contracts including one for a system board of adjustment. Respondent contends that such statute merely requires such a contract and does not specify what it shall contain or what it shall not contain, and that the result is that when an airline employee brings suit upon an award rendered in his favor by an adjustment board established by such a contract, he is bringing a suit on a contract and not on a statute. The suit is a common-law suit for enforcement of a contract, and the fact that such contract is one required by federal statute does not change the action from one for recovery on a contract to one for the enforcement of a right given by a federal statute.

CONCLUSION AND PRAYER

Respondent believes that the Trial Court and the Circuit Court judgment was correct, both for the reasons contained in such opinions and for the reasons herein expressed, and therefore respondent prays that on hearing either the petition for certiorari be dismissed or judgment be entered affirming the judgment of the Circuit Court and the Trial Court.

Respectfully submitted,

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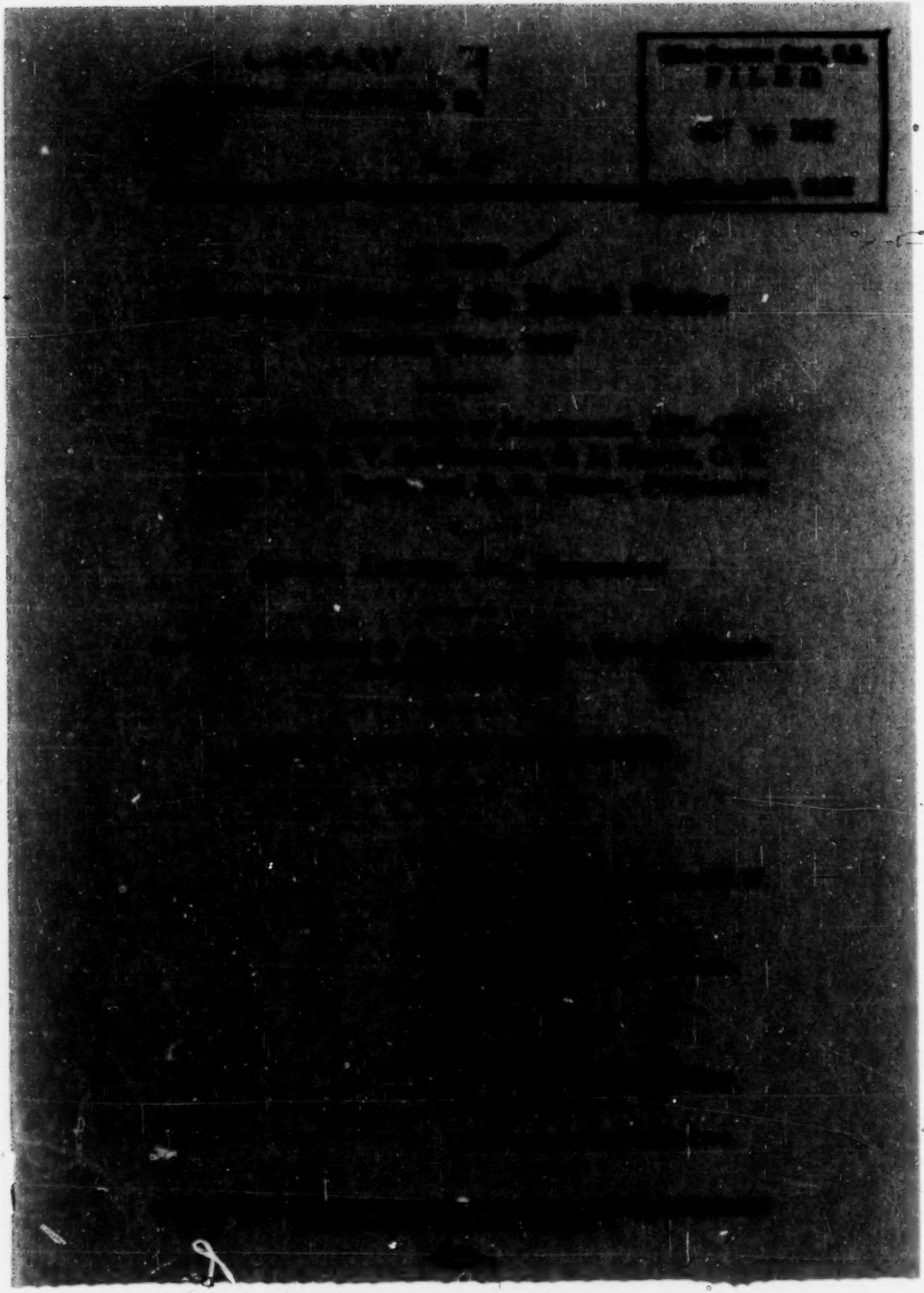
Copies of this brief have been mailed to the attorneys for the petitioners, on the same date that same were mailed to the Clerk of this Court, by mailing one copy of the brief to each of the petitioners' attorneys, addressed as follows: Plato E. Papps, 1300 Connecticut Avenue, N.W., Washington 6, D.C.; Charles J. Morris, 1601 National Bankers Life Building, Dallas 1, Texas; Bernard Dunau, 912 Dupont Circle Building, Washington 6, D.C. Also, two copies have been mailed to the attorneys for amicus curiae, addressed to Samuel J. Cohen, 50 East 42nd Street, New York 17, New York.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 61

INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, R. K. DOUD, S. V. CORNSTUBBLE, O. L. BROOM, C. R. CASEY, P. R. DAVIS, and E. E. FUQUA, *Petitioners*

v.

CENTRAL AIRLINES, INC., *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONERS

I. Jurisdiction Exists Under 28 U.S.C. § 1337, So That An Inquiry Into the Sufficiency of the Allegation of the Jurisdictional Amount for the Purpose of 28 U.S.C. § 1331 Is Irrelevant; the Jurisdictional Amount is in Any Event Adequately Alleged and Any Defect Can Be Cured By Amendment

Respondent contends that the complaint alleges jurisdiction solely under 28 U.S.C. § 1331; that the jurisdictional averment under 28 U.S.C. § 1331 is defective in that it fails to allege that the matter in controversy as to each individual employee-plaintiff exceeds

$10,000; and that consideration of the District Court's jurisdiction should be confined to this single ground and the judgment affirmed based on it (Pet. br. pp. 4, 7-9, 19, 47). We shall show, first, that the allegations of the complaint indisputably establish jurisdiction under 28 U.S.C. § 1337 so that the District Court's jurisdiction is inescapably well-founded; and second, apart from the corresponding utter irrelevancy of respondent's contention pertaining to 28 U.S.C. § 1331, that contention is in any event without merit.

1. The complaint in its entirety amply alleges every fact essential to show jurisdiction under 28 U.S.C. § 1337. The omission of a formal averment invoking 28 U.S.C. § 1337 by name of course does not matter. The point is settled and exemplified by this Court's decision in *American Federation of Labor* v. *Watson*, 327 U.S. 582, 589-591. The complaint in that case alleged jurisdiction solely under Judicial Code § 24(1), 28 U.S.C. § 41(1) (now 28 U.S.C. § 1331), and Judicial Code § 24(14), 28 U.S.C. § 41(14) (now 28 U.S.C. § 1343(3)).[1] There was no allegation of jurisdiction under Judicial Code § 24(8), 28 U.S.C. § 41(8) (now 28 U.S.C. § 1337). The three-judge District Court found jurisdiction to exist under § 24(1) and § 24(14) of the Judicial Code as alleged in the complaint.[2] The finding of jurisdiction under § 24(1) was not contested by any party on the appeal to this Court.[3] Nevertheless, despite the absence of a challenge to the finding of jurisdiction under § 24(1) and the absence of an allegation

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[1] Record, p. 3, *American Federation of Labor* v. *Watson*, 327 U.S. 582, October Term 1945, No. 448.

[2] *Id.*, pp. 205, 209-210.

[3] 327 U.S. at 590.

of jurisdiction under § 24(8), this Court *sua sponte* disclaimed reliance on § 24(1) or § 24(14) and predicated jurisdiction on § 24(8). This Court stated that: "We do not pass on the question whether the District Court had jurisdiction under § 24(1) or § 24(14) of the Judicial Code. For it is the view of a majority of the Court that jurisdiction is found in § 24(8) of the Judicial Code, . . . which grants the federal district courts jurisdiction of all 'suits and proceedings under any law regulating commerce.'" 327 U.S. at 591. The court below was therefore wholly correct in independently raising and considering the existence of jurisdiction under 28 U.S.C. § 1337 notwithstanding the absence of a formal averment in the complaint invoking it by name (R. 41, n. 1).[4]

2. Respondent's contention that the jurisdictional amount requisite to 28 U.S.C. § 1331 is inadequately alleged is therefore utterly irrelevant. It is in any event without merit. The premise of the contention is that the claim of each of the six individual employee-plaintiffs is separate and distinct; that there is no sufficient allegation that as to each of these several plaintiffs the matter in controversy exceeds $10,000; and that these several claims cannot be aggregated to make up the requisite amount. Analysis discloses the numerous fallacies in this contention.

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[4] In this case, all that is lacking is the formal averment, every fact essential to show jurisdiction under 28 U.S.C. § 1337 being amply alleged. Official Form 2(c) of the Federal Rules of Civil Procedure, pertaining to 28 U.S.C. § 1337, does not require that 28 U.S.C. § 1337 shall be invoked by name. Indeed, even where the complaint is deficient in alleging an essential jurisdictional element, jurisdiction is still well-founded if the requisite element is otherwise shown in the record. *Norton* v. *Larney*, 266 U.S. 511; *Sun Printing and Publishing Ass'n* v. *Edwards*, 194 U.S. 377.

(a) The threshold fallacy is that the contention disregards the position of the Union as a plaintiff. The Union has an unquestionable justiciable interest in the enforcement of the award.[5] The complaint seeks a judgment "ordering defendant to comply with said award . . ." (R. 4). The award sustains the grievances of six named employees and provides that "They are entitled to reinstatement without loss of seniority and should be made whole for any loss of pay involved . . ." (R. 26). The award thus requires the restoration of six jobs, the attaching seniority, and the lost earnings, and no one doubts that the worth of these in totality

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[5] Respondent's suggestion that the Union is not a proper party to the action is frivolous (Resp. br. pp. 2-3, 13). The Union is the exclusive bargaining representative of the employees; the Union and the carrier negotiated and are the parties to the collective bargaining agreement; the Union and the carrier established the system board of adjustment; only the Union or the carrier may submit a dispute to the board (R. 5-6, 7) and only the Union or the carrier may petition the National Mediation Board for appointment of a neutral to sit with the board when the board deadlocks over a dispute (R. 8); the Union is under a duty to administer the agreement and the machinery for its enforcement fairly and impartially on behalf of the employees (*Conley* v. *Gibson*, 355 U.S. 41, 46-47); and the award at issue in this case eventuated from the Union's action invoking and carrying through these processes. The Union's interest in maintaining the integrity of its agreement and the means for its enforcement (*Tennessee Electric Power Co.* v. *T.V.A.*, 306 U.S. 117, 137), and its nexus with the employees it represents (*N.A.A.C.P.* v. *Alabama*, 357 U.S. 449, 458-460; *MacArthur Liquors, Inc.* v. *Palisades Citizens Ass'n*, 265 F. 2d 372, 374 (C.A.D.C.)), confer standing upon it to bring an action to enforce the award. See *United Steelworkers* v. *Enterprise Wheel and Car Corp.*, 363 U.S. 593, in which the union brought an action to enforce an award requiring the reinstatement of employees with back pay, and *Retail Clerks International Ass'n* v. *Lion Dry Goods*, 369 U.S. 17, in which the union brought an action to enforce two arbitration awards, one of which required the reinstatement of two employees to particular jobs.

"exceeds the sum or value of $10,000, exclusive of interests and costs. . . ."[6] The jurisdictional amount is thus easily satisfied by the value of the whole of the award. The "matter in controversy" is the whole of the award. The Union's interest extends to the whole of the award. It is not a divisible interest apportionable on the basis of each individual employee's personal pecuniary stake in the award. Had respondent brought an action in the District Court to set aside the award, the jurisdictional amount would have been determined and satisfied by the liability imposed by the award in its entirety. The jurisdictional amount is not less because the Union brings an action to enforce the award rather than respondent to set it aside. "No matter which party brings it into court, the controversy remains the same; it involves the same amount of money and is to be adjudicated and determined under the same rules. Unquestionably, therefore, the amount in controversy is in excess of $10,000." *Horton* v. *Liberty Mutual Ins. Co.*, 367 U.S. 348, 354.

(b) Disregarding the Union as a plaintiff, and considering only the six individual employees as plaintiffs, the result is no different. "Where . . . several plaintiffs unite to enforce an 'integrated' or 'undivided' right, it is the value of the entire right which is in controversy and this total value is used, when pertinent, in determining whether or not federal jurisdiction exists."[7] The "matter in controversy" is determinative. Here the matter in controversy is the award. The six individual plaintiffs have a completely unitary interest in the award. It is the single source of an identic claim.

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[6] *Cf.*, *Friedman* v. *I.A.M.*, 220 F. 2d 808 (C.A.D.C.), cert. denied, 350 U.S. 824.

[7] 1 Moore's Federal Practice, 890-891 (1961).

If the award is valid, they prevail together; if the award is invalid, they fall together. And the award is valid or invalid upon grounds common to each. Theirs is a joint and undivided interest in the validity of the award. *Shields* v. *Thomas*, 17 How. 3.

The soundness of this analysis is confirmed by authority. In *Local Union No. 497* v. *Joplin & P. Ry. Co.*, 287 F. 473 (C.A. 8), a local union and its officers, on behalf of the union members collectively, brought an action to recover $7,271.47, alleging that this sum was due to the employees as wages based on the legal effect of the findings and order of a court of industrial relations. The requisite jurisdictional amount was found to exist in reliance upon the aggregated demand of $7,271.47, although no individual employee was due more than $100. The court explained that (287 F. at 475-476):

> This action is brought by or on behalf of the employees, members of the union, collectively to recover the amount alleged to have been in effect adjudged to be due to them by the finding and order of the industrial court of April 23, 1920. This action was and is founded on that finding and order. The plaintiffs alleged in their complaint, and the defendant denied in its answer, and still denies, that that finding and order in effect adjudged that the defendant owed and shall pay to the employees, the members of the union, collectively, $7,271.47, and this was and is the sole matter in controversy between them in this action. This action presents no controversy between them as to the share of this amount to which any of the union employees is or will be entitled, or as to the amount owing to him individually. The only controversy between the plaintiffs and the defendant is whether or not by reason of the order and finding of the

> industrial court the defendant was in legal effect adjudged to pay the plaintiffs the $7,271.47, or any of it.

In *Hartford Fire Ins. Co.* v. *Bonner Mercantile Co.*, 56 F. 378 (C.A. 9), cert. denied, 154 U.S. 504, a number of insurance companies combined to set aside an award of arbitrators finding that the loss to the insured from a fire was $60,624.73. The requisite jurisdictional amount was found to exist even as to those insurance companies whose proportionate liability for the total loss was standing alone less than the jurisdictional amount. The court explained that (56 F. at 383):

> The award arose out of the common agreement of all the insurers. The object of the suit is to set it aside upon allegations and evidence common to all parties assailing the same. . . . The subject in controversy, therefore, is the validity of the award, —shall the award stand, or shall it be set aside,— and the amount in controversy must be held to be the amount of the award, which is the subject of the suit.

As with the findings and order of the industrial relations court adjudging wages due, and as with the award determining total fire loss, so here, it is the award in its entirety which is the "matter in controversy" and which in its entirety is therefore determinative of the existence of the jurisdictional amount. See also, *Division 525, Order of Railway Conductors* v. *Gorman*, 133 F. 2d 273, 275-276 (C.A. 8).

(c) Finally, even if it were true that the jurisdictional amount must be separately alleged as to each individual employee-plaintiff and that the complaint is defective in this regard, the single proper course would be to grant petitioners leave to amend the complaint to allege this element. This claimed defect is

asserted for the first time in this Court so that petitioners have had no previous occasion to address themselves to it. As respondent states, it "makes no claim that this was raised in the Trial Court or that the Trial Court dismissed on this ground" (Res. br. p. 8). Were petitioners required to do so, they could in good faith allege that the jurisdictional amount is separately involved as to each of them. Assuming the materiality of the allegation, therefore, leave to amend should be granted. "Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts." 28 U.S.C. § 1653.

II. There Is No Merit to the Contention That Federal Question Jurisdiction Does Not Exist Because the Right Asserted Is Said to be Based on "Federal Common Law" and "Not Federal Statutory Law"

Respondent contends that federal question jurisdiction does not exist because the federal right asserted here is based on "federal common law" and "not federal statutory law" (Res. br. pp. 19-27). But since the claim is founded on the Railway Labor Act, respondent can only relevantly mean that a claim does not arise under federal law if it rests on judicial elaboration of the basic statutory command. This view is quite mistaken. A claim founded on section 301(a) of the Labor Management Relations Act, 1947, is one "arising under" federal law even though its content derives from exercise of the authority Congress conferred on the "federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements. . . ." *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 451. Judicial amplification is part and parcel of the Railway Labor Act as well. Thus, the duty of fair representation imposed by that act upon a labor organization in the exercise of its

exclusive bargaining authority is not expressed in terms by the statute but is read into it. Complaint of violation of this duty asserts "a federal right implied from the statute and the policy which it has adopted. It is the federal statute which condemns as unlawful the . . . [bargaining representative's] conduct. 'The extent and nature of the legal consequences of this condemnation, though left by statute to judicial determination, are nevertheless to be derived from it and the federal policy which it has adopted.' * * * *The case is therefore one arising under a law regulating commerce of which the federal courts are given jurisdiction by 28 U.S.C. § 41(8), Judicial Code § 24(8) [now 28 U.S.C. § 1337]. . . .*" *Tunstall* v. *Brotherhood of Locomotive Firemen*, 323 U.S. 210, 213 (emphasis supplied).

It is of the essence of law-making that Congress prescribes the basic command and commits its elaboration to others. *Yakus* v. *United States*, 321 U.S. 414, 423-427.[8] Although the statute is thus infused with

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[8] Speaking of the Sherman Anti-Trust Act, this Court observed that, "As a charter of freedom, the Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions. It does not go into detailed definitions which might either work injury to legitimate enterprise or through particularization defeat its purposes by providing loopholes for escape. The restrictions the Act imposes are not mechanical or artificial. Its general phrases, interpreted to attain its fundamental objects, set up the essential standard of reasonableness." *Appalachian Coals* v. *United States*, 288 U.S. 344, 359-360.

Speaking of the National Labor Relations Act, this Court stated that it "did not undertake the impossible task of specifying in precise and unmistakable language each incident which would constitute an unfair labor practice. On the contrary that Act left to the Board the work of applying the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms." *Republic Aviation Corp.* v. *N.L.R.B.*, 324 U.S. 793, 798.

content and scope by interpretation it is still the statute upon which the claim is founded. It would be impossible to divide a statute from its interpretation so as to say that a claim is outside the reach of federal question jurisdiction because it is based on judicial determination of the implications of the statute and not on the statute unaided by construction—an altogether artificial and unmanageable bifurcation. Federal question jurisdiction rests on no such unreal foundation, as is plain from the most restrictive formulation of its scope (Mishkin, *The Federal "Question" In The District Courts*, 53 Col. L. Rev. 157, 165 (1953)):

> The first formulation of the requirement developed by the courts is that the plaintiff must be contending that a federally ordained rule specifically creates his cause of action. Any national source will suffice, whether Constitution, treaty or law. Indeed, he need not maintain ever that some piece of national legislation provides, in so many words, the governing rule of substance; if it is his position that his right to relief is granted by federal common law, whether in connection with a statute or otherwise, jurisdiction in the national trial courts will be supported. But, regardless of the specific form in which he finds his federal authority, it must—according to him, at least—establish his substantive right to a remedy; or, characterized briefly, his claim must be founded "directly" upon national law.

In short, a claim arises under the Railway Labor Act and is hence within the reach of federal question jurisdiction even though the governing rule in support of the claim is shaped by judicial amplification of the congressional command.[9]

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[9] Since the federal right asserted here is based on the Railway Labor Act, we have no occasion to consider the status of a federal rule created by federal courts in the absence of an applicable Act

III. Description of the Action As One on a Contract or to Enforce a Contract Right Does Not Detract From Its Character as an Action Arising Under the Railway Labor Act

In an attempt to show that the action does not arise under the Railway Labor Act, respondent intertwines two arguments: (1) This is an action to enforce an award; an action to enforce an award in an action on a contract; ergo, it does not arise under the Railway Labor Act. (2) This is an action for reinstatement and back pay based on wrongful discharge; protection against wrongful discharge is conferred by contract;

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of Congress (*United States* v. *Standard Oil Co.*, 332 U.S. 301), other than to mention that the source of a federal right in such federal common law would appear to make no difference to the applicability of 28 U.S.C. § 1331. For 28 U.S.C. § 1331 speaks of a "matter in controversy" which "arises under the . . . laws . . . of the United States," and a federal rule enunciated by the judicial branch would seem to be as much a law of the United States as that promulgated by the legislative branch. *Cf.*, *Shelley* v. *Kraemer*, 334 U.S. 1, 14-18; *Hughes* v. *Superior Court*, 339 U.S. 460, 466-467; *West* v. *American Tel. & Tel. Co.*, 311 U.S. 223, 236-238.

Nor is analysis advanced by the truism intermittently invoked by respondent that a claim does not arise under federal law merely because a federal question may emerge in the course of the action. In this case the governing rule in support of the claim is federally prescribed and that is the hallmark of federal question jurisdiction.

Finally, citing *Moore*, *Slocum*, and *Koppal*, respondent takes the position that the action here is controlled by state law (Res. br. pp. 22-24). Respondent misconceives the scope of these cases as the decisions of this Court show (Pet. br. p. 21, n. 7). A narrow exception in favor of an "unusual and special situation" and confined to a discharge "accepted as final by the employee" (*Pennsylvania R. Co.* v. *Day*, 360 U.S. 548, 553-554) cannot provide the rule for the usual and general situation of an action to enforce an award and in which the employees, far from accepting their discharge as final, do just the opposite and actively seek reinstatement to their jobs.

ergo, the action does not arise under the Railway Labor Act. (Res. br. pp. 28-47.)[10]

Neither formulation faces up to the issue. An action to enforce an award does not exist in limbo. Plaintiff must invoke some source of authority to show why his claim is good. Some law must be applicable to

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[10] As with the other cases we have already discussed (Pet. br. p. 55, n. 41), the additional cases cited by respondent to support this position are not helpful. (1) In *Starke* v. *N.Y., Chi. & St. L.R. Co.*, 180 F. 2d 569 (C.A. 7), res. br. p. 37, the court correctly concluded that, in an action to enforce seniority rights allegedly granted by agreement, "Congress having specifically conferred upon the Adjustment Board the authority to hear and determine plaintiff's grievance, it is not in the absence of express language to be implied that it also intended to confer jurisdiction upon the courts" (*id.* at 573). The case would be apposite only if petitioners here had bypassed the adjustment board and sought a judicial remedy without recourse to it. (2) The same is true of *Hettenbaugh* v. *ALPA*, 189 F. 2d 319 (C.A. 5), res. br. pp. 37-38, the court observing that "Appropriate quasi-judicial tribunals have been established" for the purpose of affording "relief for breaches of performance of collective bargaining agreements" (*id.* at 321). The case does not hold that, after the quasi-judicial tribunals have acted and rendered an award, an action to enforce the award is not cognizable by a federal district court under its federal question jurisdiction. To the extent that the complaint in that case alleged a violation of the duty of fair representation in the administration of the agreement, dismissal of the complaint for lack of federal question jurisdiction was held to be wrong by this Court in *Conley* v. *Gibson*, 355 U.S. 41, and reliance upon *Hayes* v. *Union Pac. R. Co.*, 184 F. 2d 337 (C.A. 9), to support the dismissal invokes a case which this Court in *Conley* v. *Gibson* stated "was decided incorrectly" (355 U.S. at 44, n. 4). (3) *Barnhart* v. *Western Maryland R. Co.*, 128 F. 2d 709 (C.A. 4), cert. denied, 317 U.S. 671, res. br. p. 38, pertains to an agreement eventuating from the purely advisory powers of the Railroad Labor Board pursuant to the Transportation Act of 1920, and the latter Act, now repealed, had a statutory scheme fundamentally different from that which presently obtains. *Texas & N. O. R. Co.* v. *Brotherhood of Railway Clerks*, 281 U.S. 548, 560-570.

support his action. Some sovereign must prescribe what that law is. Petitioners in this case invoke the air part of the Railway Labor Act as the source of their authority to support their claim for enforcement of the award. The right to enforcement is drawn from and determined by that statute. The rule of law in support of the claim is fashioned from it. Congress is the sovereign. And so the action to enforce the award arises under the air part of the Railway Labor Act because the governing rule supporting the claim is prescribed by it. It makes no difference to the analysis if the award is pushed back to the underlying contract right which it encases and vindicates. The contract right is given efficacy by the adjustment board procedure ordained by Congress. It cannot be enforced except through that procedure. The culmination of the procedure is an award. We return therefore to the same point.

Respondent itself furnishes the clue. At the threshold of any action to enforce an award is the rule of law applicable to determine the validity of the award. According to respondent, "the agreement of the parties could not make the award of such an adjustment board more final than one by the Railway Adjustment Board, but they could make it less final . . ." (Res. br. p. 41). Thus, for the governing rule to determine the enforceability of the award in this case, respondent looks to the standard of finality prescribed by Congress under section 3 First (m) of the rail part of the Railway Labor Act for awards rendered by the National Railroad Adjustment Board. It provides that NRAB "awards shall be final and binding upon both parties to the dispute, *except insofar as they shall contain a money award*" (emphasis supplied). RLA, title I,

sec. 3 First (m); *Union Pac. R. Co.* v. *Price*, 360 U.S. 601. This is a lesser standard of finality than the parties in this case have adopted by agreement. For the agreement provides without any qualification that "a majority vote of the Board shall be final, binding, and conclusive between the Company and the Association and anyone they may represent having an interest in the dispute" (R. 8). Respondent would thus derogate from the agreement in reliance upon its view that the air part of the Railway Labor Act incorporates as the maximum permissible standard of finality the rule applicable under the rail part to awards of the NRAB. This view is mistaken. Nothing in the terms of the air part prohibits the parties from contracting for complete conclusiveness and the object of the air part to promote "prompt and orderly settlement" is enhanced by it. As the policy of the air part wholly harmonizes with the contractual standard, the statute gives effect to it. Indeed, as to the rail part itself, in acting under the authorization of section 3, second, title I, to establish a system, group, or regional board of adjustment as an alternative to proceeding before the NRAB, the rail carrier and the representative would be free to agree upon a standard of finality more conclusive than that applicable to an award of the NRAB, and one of the very reasons inducing the parties to set up a contractual board might very well be to obtain the benefits of enhanced finality not available in proceedings before the NRAB. Thus, under both the air part and the rail part, parties are free to contract that an award "shall be final, binding, and conclusive" upon all, and the statute gives effect to this compact and holds the parties to their promise. And no court in determining the finality of an award rendered by an airline system board of adjustment has ever considered subtracting

from its conclusiveness in reliance upon the lesser finality of an award of the NRAB.[11] Pet. br. p. 19, n. 6. But whether petitioners' or respondent's view of the merits of this question is correct, the presently relevant point is that both look to the Railway Labor Act as the effective source for determining the governing rule, and the content of the rule is an essential part of plaintiff's cause of action in seeking enforcement of the award. The conclusion is therefore inescapable that the action arises under the Railway Labor Act.

Respectfully submitted,

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October, 1962.

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[11] Caution also requires us to mention that, contrary to respondent's contention (br. p. 41), parties are not free to set up an adjustment board which is not invested with full jurisdiction to adjudicate all disputes "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions," for any lesser jurisdiction would conflict with the purpose of Congress to establish an effective adjustment procedure for the settlement of all disputes of this class.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 61

INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, R. K. DOUD, S. V. CORNSTUBBLE, O. L. BROOM, C. R. CASEY, P. R. DAVIS, and E. E. FUQUA, *Petitioners*,

vs.

CENTRAL AIRLINES, INC., *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Fift Circuit

RESPONDENT'S PETITION FOR REHEARING

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IN THE

SUPREME COURT OF THE UNITED STATES

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RESPONDENT'S PETITION FOR REHEARING

Central Airlines, Inc., respondent herein, hereby respectfully petitions the Court to grant a rehearing herein for the following reasons:

1.

The opinion of the Court is so written as to give rise and support to the interpretation that federal jurisdiction in the case at bar is exclusive. Respondent is confident that such was not the intention or purpose of the Court. This is based upon respondent's intimate acquaintance with the submission of the case on briefs and oral argument.

Granting federal jurisdiction as the Court has held,

it follows that such jurisdiction is concurrent with that of the state courts. *Teamsters Union vs. Lucas Flour Co.*, 369 U.S. 95, 7 L.Ed. 2d 593; *Doud Box Co. vs. Courtney*, 368 U.S. 502, 7 L.Ed. 2d 483.

The Court appears to have recognized the existence of such concurrent jurisdiction by drawing, (as it does at page 10 of the slip opinion) a parallel to award cases arising under Section 301 of the Labor Management Relations Act, 1947. (29 USCA Sec. 185) Although respondent believes this to be true, it is doubtful in the context of the entire opinion that either a state or federal trial court would so construe the opinion. Little, if any imagination is required to envision a trial court saying that if the Supreme Court meant to hold that there was concurrent jurisdiction it knew how to say so and it would have done so.

In the course of oral argument, counsel for petitioners, in response to a question from the bench, conceded, as indeed one must, that if the federal courts have jurisdiction it is concurrent with the jurisdiction of the courts of the state and not exclusive. This, of course, is not reflected in the record of the case so as to aid in the interpretation of the Court's opinion in applying it to the instant case in the trial court or in the state court in which an action to set aside the award was first filed and is still pending awaiting trial. With the court's opinion in its present posture, it is doubtful that petitioners will again concede state court jurisdiction.

In any event, respondent respectfully submits that

the correct interpretation of the opinion of the court, i.e. that there is concurrent jurisdiction of federal and state courts, should be made to appear clearly on the face of the opinion and not left to speculation and argument or made to rest or depend upon admissions and statements of counsel. Absent clarification, it is probable that litigation will result concerning the meaning and proper interpretation of the court's opinion and holding in the present case as well as in other like or analogous situations. This can and should be obviated by the clarification sought hereby.

2.

The opinion goes outside and beyond the sole issue presented for decision, namely, whether or not the Federal District Court had jurisdiction to entertain and decide the suit brought therein by petitioners. The District Court dismissed the suit for want of jurisdiction in advance of any hearing or trial on the merits. It was in respect to this action by the District Court that the instant appeal was prosecuted.

In consequence, the sole "Question Presented" as stated by petitioners in their brief was,

> Whether a suit to enforce an award of an airline system board of adjustment, created by requirement of the Railway Labor Act, presents a federal question that confers jurisdiction on a United States District Court. (at page 2)

In its reply brief, respondent stated the question as follows:

> Whether a suit by an individual airline employee

> to enforce an award by an airline system board of adjustment is one which arises under the Constitution, laws and treaties of the United States. (at page 2)

Thus, petitioners and respondent agreed that federal jurisdiction was the only issue presented. This was the only question that was briefed and argued to the court and the only one that was before the court for decision.

Respondent respectfully submits that the opinion clearly goes outside and beyond that issue and contains statements and expressions in respect to other matters, such as the finality of the award of a system board, which were not before the court on brief, argument or otherwise and which are not related or necessary to a decision of the jurisdictional question.

With all deference, respondent suggests that such extraneous statements and expressions are likely improperly to affect and interfere with the trial and disposition of the case in the courts below. Respondent therefor respectfully petitions the Court to remove from its opinion all such expressions and statements so as to confine the opinion to the single issue of jurisdiction or, in the alternative, to make clear in the opinion that such statements and expressions are at most dicta.

Conclusion

For these reasons, respondent petitions the Court to grant a rehearing and thereupon to modify and amend the opinion in accordance with the foregoing.

Respectfully submitted,

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By .....
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Attorneys for Respondent

CERTIFICATE OF COUNSEL

I, Karl H. Mueller, an attorney for respondent and a member of the bar of the Supreme Court of the United States, hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

.....
Karl H. Mueller
Attorney for Respondent

May 7, 1963

CERTIFICATE OF SERVICE

Copies of this petition for rehearing have been mailed to the attorneys for the petitioners, on the same date that same were mailed to the Clerk of this Court, by mailing one copy thereof to each of the petitioners' attorneys, addressed as follows: Plato E. Papps, 1300 Connecticut Avenue, N.W., Washington 6, D.C.; Charles J. Morris, 1601 National Bankers Life Building, Dallas 1, Texas; Bernard Dunau, 912 Dupont Circle Building, Washington 6, D.C. Also, two copies have been mailed to the attorneys for amicus curiae, addressed to Samuel J. Cohen, 50 East 42nd Street, New York 17, New York.

May 7, 1963